VERMAN and L. SILVERMAN, have been attached and seized by the Sheriff of the said City and County, under and by virtue of the said writ;

AND WHEREAS, the said Defendants, SAN FRANCISCO IRON & METAL COMPANY, a Corporation, H. SILVERMAN and L. SILVERMAN, are desirous of having said property credits and effects released from said attachment,

NOW, THEREFORE, the undersigned, THE CENTURY INDEMNITY COMPANY, Hartford, Connecticut, a corporation organized and existing under the laws of the State of Connecticut, and duly authorized and licensed to do a general surety business in the State of California, in considera[2]tion of the premises, and also in consideration of the release from said attachment of the property credits and effects attached, as above mentioned, does hereby undertake in the sum of Six Thousand and no/100 ($6,000.00) Dollars, and promise that in case the Plaintiff recovers judgment in the action against Defendants, SAN FRANCISCO IRON & METAL COMPANY, a Corporation, H. SILVERMAN and L. SILVERMAN, said Defendants, SAN FRANCISCO IRON & METAL COMPANY, a Corporation, H. SILVERMAN and L. SILVERMAN, will, on demand, redeliver the attached property

credits and effects so released to the proper officer, to be applied to the payment of such judgment, or in default thereof, that said Defendants, SAN FRANCISCO IRON & METAL COMPANY, a Corporation, H. SILVERMAN and L. SILVERMAN, will, on demand, pay to the Plaintiff the full value of the property credits and effects released, not exceeding the amount of such judgment.

IN WITNESS WHEREOF, the corporate seal and name of the said Surety Company is hereto affixed at San Francisco, California, by its duly authorized Attorney-in-Fact, this 14th day of February, A. D. 1929.

THE CENTURY INDEMNITY COMPANY
By F. J. CRISP
Attorney in Fact
F. J. Crisp" (Seal)

IV.

That thereafter, on the 14th day of February, 1929, said bond was amended as hereinafter mentioned and a stipulation was entered into as follows:

"In the Superior Court of the State of California in and for the City and County of San Francisco.

No. 204668

V. BERGES,

Plaintiff,

vs.

N. ABRAHAM, et al.,

Defendants.

STIPULATION

IT IS HEREBY STIPULATED AND AGREED between plaintiff, defendants San Francisco Iron & Metal Company, a corporation, H. Silberman, Sr., H. Silberman, Jr. and L. Silberman and the Century Indemnity Company, as follows: [3]

1.—That the bond of the Century Indemnity Company dated February 14, 1929, be and it is hereby corrected so as to change "Silverman" to "Silberman."

2.—That for the purposes of said bond, the plaintiff has before February 14, 1929, attached property, credits and effects of each of said four defendants of the then value of $6,000.00 each.

3.—That said bond supersedes and takes the place of the Century Indemnity Company bond heretofore filed in the above matter and said former bond is hereby declared to be null and

void and without effect.

Dated: February 14, 1929.

ROBERT E. HATCH
Attorney for Plaintiff.

LOUIS E. GOODMAN
Attorney for Defendants.

THE CENTURY INDEMNITY COMPANY,
By F. J. Crisp
Attorney in Fact."

V.

That upon the issuance of said undertaking of defendant herein and the execution of the stipulation hereinbefore referred to and in consideration thereof, the Sheriff of the City and County of San Francisco released said attached property and/or credits and/or effects of said defendants and returned the same to the said defendants.

VI.

That thereafter, on or about the 10th day of October, 1929, judgment was rendered for the sum of Five Thousand Six Hundred Forty-three and 65/100 ($5,643.65) Dollars, together with legal interest thereon and costs in the amount of Sixty-nine and 90/100 ($69.90) Dollars against SAN FRANCISCO IRON & METAL COMPANY, a corporation, and the defendant L. SILBERMAN in favor of the plaintiff V. BERGES in said action numbered 204,668; that said judgment has not been re-

versed or modified and has become final and is wholly unpaid and unsatisfied. [4]

VII.

That on or about the 21st day of February, 1930, the plaintiff, V. BERGES, sold, assigned and transferred to the plaintiff herein, G. NELSON, the said judgment in favor of plaintiff, V. BERGES, against SAN FRANCISCO IRON & METAL COMPANY, a corporation, and L. SILBERMAN, in the amount of Five Thousand Six Hundred Forty-three and 65/100 ($5,643.65) Dollars, together with Sixty-nine and 90/100 ($69.90) Dollars costs and with interest thereon at the rate of seven per cent (7%) per annum, for the full use and benefit of the plaintiff herein G. NELSON; that there is now due, owing and unpaid to plaintiff herein said sum of Five Thousand Six Hundred Forty-three and 65/100 ($5,643.65) Dollars, together with costs in the amount of Sixty-nine and 90/100 ($69.90) Dollars and interest thereon at the rate of seven per cent (7%) from the date of said judgment, although demand has been made for the payment thereof prior to the commencement of this action; that said judgment is recorded in Judgment Book 305 at page 67, in the Office of the Clerk of the above entitled court.

VIII.

That after the judgment in said action #20466 became final in favor of V. Berges and prior to the commencement of this action, a Writ of Execution

against defendant L. Silberman was issued to the Sheriff of the County of Los Angeles, State of California, where L. Silberman then resided, and said execution was returned by the said Sheriff wholly unsatisfied; that the San Francisco Iron & Metal Company, a corporation is insolvent and bankrupt and bankruptcy proceedings are now pending; that prior to the commencement of this action, claim was duly filed in said bankruptcy proceedings in behalf of plaintiff herein for payment of said judgment hereinbefore referred to, but plaintiff is informed and believes [5] and therefore alleges that there are no assets of said bankrupt to pay said judgment; that plaintiff is informed and believes and therefore alleges upon such information and belief that the defendant L. Silberman is also insolvent; that prior to the commencement of this action and after said judgment herein referred to became final, demand was duly made upon the defendant herein that the attached property, credits and effects hereinbefore referred to be applied to the payment of said judgment or in default thereof that payment be made in accordance with the undertaking on release of attachment furnished by the defendant herein.

IX.

That the attachment hereinbefore mentioned against said defendants was not dissolved or modified prior to the issuance of the undertaking on release of attachment and said attachment was at

all the times herein mentioned and now is in full force and effect, save and except that the attached property and/or credits and/or effects was released to said defendants by the Sheriff of the City and County of San Francisco upon and in consideration of the undertaking hereinbefore referred to.

X.

That the undertaking on release of attachment hereinbefore referred to in Paragraph III was furnished in action No. 204668 and the persons named in said bond as "H. Silverman and L. Silverman" were and are the same persons as referred to and mentioned in Paragraph IV herein as "H. Silberman and L. Silberman"; that during the course of the trial of said action No. 204668 by V. Berges, the pleadings were amended so as to change the names "H. SILVERMAN and L. SILVERMAN" to "H. SILBERMAN and L. SILBERMAN" upon order of the above entitled court.

WHEREFORE, plaintiff prays judgment for the sum of Five Thousand Six Hundred Forty-three and 65/100 ($5,643.65) [6] Dollars principal, Sixty-nine and 90/100 ($69.90) Dollars Costs, together with interest thereon at the rate of seven percent (7%) from the date of said judgment, for costs of this suit and for such other and further relief as may be meet and proper in the premises.

HADSELL, SWEET & INGALLS

Attorneys for plaintiff. [7]

State of California,
City and County of San Francisco—ss.

G. NELSON, being first duly sworn, deposes and says:—

That she is the plaintiff in the above entitled action; that she has read the foregoing complaint and knows the contents thereof; that the same is true of her own knowledge, except as to matters therein stated upon information or belief and as to those matters that she believes it to be true.

G. NELSON

Subscribed and sworn to before me this 24 day of September, 1931.

[Seal] KATHRYN E. STONE
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Superior Court Sep 24 1931
[Endorsed] Filed U. S. Dist. Court Nov 5 1931[8]

In the District Court of the United States for the Northern District of California
Southern Division
No. 19086 K

G. NELSON,
Plaintiff,
vs.
THE CENTURY INDEMNITY COMPANY, a corporation,
Defendant.

ANSWER TO COMPLAINT

Comes now the defendant, and answering the complaint denies and alleges as follows:

1. Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in paragraph II of the complaint, and therefore and upon that ground denies each and every allegation in said paragraph contained.

2. Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in paragraph III of the complaint, and therefore and upon that ground denies each and every allegation in said paragraph contained, excepting that defendant admits that it signed an alleged undertaking as therein stated.

3. Referring to paragraph IV of the complaint, defendant admits that it signed a document therein referred to, but has no information or belief upon the subject sufficient to enable it to answer whether it was signed or executed or delivered by any of the other parties thereto, and therefore and upon that ground denies said allegations. [9]

4. Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in paragraph V of the complaint, and therefore and upon that ground denies each and every allegation in said paragraph contained.

5. Referring to paragraph VI of the complaint defendant denies that the judgment as rendered was against only the persons named in said paragraph VI, and alleges the true fact to be that said judgment was also against another defendant in said action, for whom a release of attachment undertaking had been issued by Fidelity & Casualty Company of New York; denies that said judgment is wholly unpaid and unsatisfied or wholly or at all unpaid or unsatisfied, and alleges that the judgment has been fully paid and satisfied.

6. Defendant denies generally and specifically all and singular each and every allegation contained in paragraph VII of the complaint, and in that behalf alleges the fact to be that the alleged judgment in favor of V. Berges has been fully paid and satisfied, and denies that there is now due and owing and unpaid, or due or owing or unpaid to plaintiff or to any person the sum of Five Thousand Six Hundred Forty-three and 65/100 ($5,643.65) Dollars, or any sum, and/or costs in the sum of Sixty-nine and 90/100 ($69.90) Dollars, or any sum, and/or with interest or otherwise, or any sum or amount; and denies that there is any amount due or owing or unpaid to the plaintiff herein. [10]

7. Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in paragraph VIII of the complaint, and therefore and upon that ground denies each and every allegation in said

paragraph contained; and denies that demand was made upon the defendant herein that the attached property and/or credits and/or effects referred to or at all be applied to the payment of the alleged judgment.

8. Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in paragraph IX of the complaint, and therefore and upon that ground denies each and every allegation in said paragraph contained.

9. Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in paragraph X of the complaint, and therefore and upon that ground denies each and every allegation in said paragraph contained.

10. Further answering said complaint, and as a separate defense thereto defendant alleges that the Fidelity & Casualty Company of New York, a corporation, executed an undertaking for release of attachment in the proceeding referred to in the complaint herein, on behalf of one of the defendants in said action; thereafter, following judgment against the defendants in said action and pursuant to the terms of said undertaking for release of attachment, said Fidelity & Casualty Company caused to be paid to the plaintiff in said action the full amount of the judgment therein, and paid in full the judgment in said action against the defendants therein, and all of them. [11]

11. Further answering said complaint, and as a separate defense thereto, defendant alleges that the claim sued upon in the above entitled action was fully paid, satisfied and discharged prior to the commencement of this action.

12. Further answering said complaint, and as a separate defense thereto defendant alleges that the above entitled action has not been prosecuted in the name of the real party in interest, and that the plaintiff in said action is not the real party in interest.

13. Further answering said complaint, and as a separate defense thereto, defendant alleges that in action No. 204,668 referred to in paragraph II of the complaint in the above entitled action, the Fidelity & Casualty Company of New York issued an undertaking releasing an attachment in said action, and thereafter following a joint judgment against the defendants in said action said Fidelity & Casualty Company, pursuant to said undertaking, fully paid the judgment in said action, and said Fidelity & Casualty Company is attempting in this suit to recover from another surety for the payment of the obligation of said Fidelity & Casualty Company by virtue of its undertaking.

14. Further answering said complaint and as a separate defense thereto defendant alleges that prior to the commencement of this action plaintiff's assignor prejudiced the rights of the defendant herein, and in that behalf alleges upon information

and belief that plaintiff's assignor had a right of action against the Fidelity & Casualty Company upon a release of attachment undertaking issued as above stated, and that said plaintiff's assignor released said Fidelity & Casualty Company from all obligation on said undertaking, and thereby prejudiced and destroyed this defendant's right to subrogation and [12] indemnity and exoneration, and thereby said defendant was released and discharged from all further obligation to plaintiff's assignor and to plaintiff.

15. Further answering said complaint and as a separate defense thereto defendant alleges that it has been released from liability upon the alleged undertaking by reason of an agreement between plaintiff's assignor and the Fidelity & Casualty Company, which said agreement was in effect that no claim should be made against the Fidelity & Casualty Company upon the undertaking which it had executed to release the attachment in the aforesaid action, thereby prejudicing and impairing the rights of defendant herein.

16. Further answering said complaint, and as a separate defense thereto defendant alleges that the judgment in action No. 204,668, referred to in paragraph II of the complaint, was paid by the Fidelity & Casualty Company as surety upon an undertaking in said action releasing an attachment, and defendant alleges that said Fidelity & Casualty Company did not within ten days after said pay-

ment file with the Clerk of the Court where the judgment was rendered notice of such payment or claim to contribution or repayment as required by Section 709 of the Code of Civil Procedure of the State of California; that plaintiff in the above entitled action is acting for and on behalf of the Fidelity & Casualty Company, and not on plaintiff's own behalf.

17. Further answering said complaint, and as a separate defense thereto defendant alleges that the Fidelity & Casualty Company as surety executed an undertaking releasing an attachment in action No. 204,668 referred to in paragraph II of the complaint in the above entitled action, and by reason of the execution of said undertaking said Fidelity & Casualty Company [13] was obliged to pay and thereafter did pay the judgment rendered in said action; that by reason of collusion between plaintiff herein and Fidelity & Casualty Company and other parties an effort is here being made to transfer the obligation of said Fidelity & Casualty Company to the defendant herein, and by means of said collusion attempt to recover from the defendant herein for the obligation which was paid by the Fidelity & Casualty Company.

18. Further answering said complaint and as a separate defense thereto, defendant alleges that if it were obliged to pay the judgment in the above entitled action such payment would be to the plain-

tiff in the above entitled action for the benefit of Fidelity & Casualty Company, and not otherwise; and that said Fidelity & Casualty Company by reason of the execution of an undertaking to release attachment in the action referred to in paragraph II of the complaint, was obligated to pay and did pay said judgment, when it became final against the defendant in said action for whom it had executed said undertaking, and the defendant in this action has been released thereby from any further obligation to the plaintiff's assignor or to the plaintiff.

WHEREFORE, defendant prays to be hence dismissed with its costs.

REDMAN, ALEXANDER & BACON
Attorneys for Defendant [14]

State of California,
City and County of San Francisco—ss.

HOWARD WHITE, being first duly sworn, deposes and says: That he is the Manager of the Claim Division of the Century Indemnity Company, defendant in the above entitled action, and as such is authorized to verify the answer of said defendant; that he has read the foregoing answer to the complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information or

belief, and that as to such matters he believes it to be true.

HOWARD WHITE

Subscribed and sworn to before me this 30 day of Dec., 1931

[Seal] ETTA LAIDLAW

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Service of the within answer admitted this 31st day of December 1931.

HADSELL, SWEET, INGALLS

Attorney for Plaintiff

[Endorsed]: Filed Dec 31 1931 [15]

[Title of Court and Cause.]

WAIVER OF JURY

To the Above Entitled Court and to the Clerk Thereof and to Defendant the Century Indemnity Company and Messrs. Redman, Alexander & Bacon, its Attorneys:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the plaintiff herein waives a trial by jury in the above entitled cause and requests that the same be submitted to the court without the intervention of a jury.

Dated: February 4, 1932.

HADSELL SWEET & INGALLS

Attorneys for Plaintiff

[Endorsed] Service and receipt of a copy of the within Waiver of Jury is hereby admitted this 5th day of February 1932.

REDMAN, ALEXANDER & BACON
Attorney for defendant.

[Endorsed]: Filed Feb 5, 1932. [16]

[Title of Court and Cause.]

WAIVER OF TRIAL BY JURY

Defendant hereby waives trial by jury in the above entitled cause.

Dated: February 24th 1932.

REDMAN, ALEXANDER & BACON
Attorneys for Defendant.

[Endorsed]: Filed Feb 25 1932. [17]

District Court of the United States,
Northern District of California,
Southern Division

AS A STATED TERM of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 31st day of May, in the year of our Lord one thousand nine hundred and thirty-four.

PRESENT: the Honorable Frank H. Kerrigan, District Judge.

[Title of Cause.]

This case having been heretofore heard and submitted and due consideration having been had, it is Ordered that Judgment be entered for plaintiff, with interest and costs, upon Findings of Facts and Conclusions of Law, to be presented. [18]

[Title of Court and Cause.]

Defendant, Century Indemnity Company herewith submits its proposed special findings of fact and conclusions of law in lieu of those proposed by plaintiff.

REDMAN, ALEXANDER & BACON
R. P. WISECARVER
Attorneys for defendant.

Received copy of the within proposed special findings and conclusions of law this 11th day of June, 1934.

HADSELL, SWEET, INGALLS & LAMB
Attorneys for Plaintiff [19]

[Title of Court and Cause.]

PROPOSED SPECIAL FINDINGS AND CONCLUSIONS OF LAW

I.

That at all the times herein mentioned the defendant The Century Indemnity Company was and now is a corporation organized and existing under the

laws of the State of Connecticut and duly authorized and licensed to do a general surety business in the State of California; and at all times herein mentioned the Fidelity and Casualty Company of New York was a corporation organized and existing under the laws of the State of New York and duly authorized and licensed to do a general surety business in the State of California.

II.

That on or about the 9th day of February, 1929, one V. Berges filed an action in the Superior Court of the State of California, in and for the City and County of San Francisco, against N. Abraham, San Francisco Iron & Metal Company, a corporation, L. Silberman and H. Silberman, said action being numbered 204668 therein; that thereupon in said action a writ of attachment was issued and levied against the property, credits and effects of the defendants San Francisco Iron & Metal Company, a corporation, [20] H. Silberman and L. Silberman, as security for the satisfaction of any judgment that might be recovered by plaintiff V. Berges, and certain property, credits and effects of each of said defendants of the value of $6,000.00 for each of said defendants were attached and seized by the Sheriff of the said City and County of San Francisco pursuant to said writ of attachment.

III.

That thereafter, on or about the 14th day of February, 1929, the defendant The Century Indemnity Company made, executed and delivered its undertaking on release of the attachment herein mentioned, as follows:

"In the Superior Court of the State of California in and for the City and County of San Francisco

V. BERGES,

Plaintiff

vs.

SAN FRANCISCO IRON & METAL COMPANY, a corporation, H. SILVERMAN and L. SILVERMAN,

Defendants

UNDERTAKING ON RELEASE OF ATTACHMENT

WHEREAS, the above named Plaintiff commenced an action in the Superior Court of the City and County of San Francisco, State of California, against the above named Defendants claiming that there was due to said Plaintiff from said Defendants the sum of Four Thousand Seven Hundred Nine and 61/100 ($4,709.61) Dollars, or thereabouts, and thereupon an attachment issued against the prop-

erty, credits and effects of Defendants SAN FRANCISCO IRON & METAL COMPANY, a corporation, H. SILVERMAN and L. SILVERMAN, as security for the satisfaction of any judgment that might be recovered therein; and certain property credits and effects of the said Defendants, San Francisco Iron & Metal Company, a corporation, H. Silverman and L. Silverman, have been attached and seized by the Sheriff of the said City and County, under and by virtue of the said writ;

AND WHEREAS, the said Defendants San Francisco Iron & Metal Company, a corporation, H. Silverman and L. Silverman, are desirous of having said property credits and effects released from said attachment, [21]

NOW THEREFORE, the undersigned, The Century Indemnity Hartford, Connecticut, a corporation organized and existing under the laws of the State of Connecticut, and duly authorized and licensed to do a general surety business in the State of California, in consideration of the premises, and also in consideration of the release from said attachment of the property credits and effects attached, as above mentioned, does hereby undertake in the sum of Six Thousand and no/100 ($6,000.00) Dollars, and promise that in case the Plaintiff recovers judgment in the action against Defendants, San Francisco Iron & Metal Com-

pany, a corporation, H. Silverman and L. Silverman, said Defendants, San Francisco Iron & Metal Company, a corporation, H. Silverman and L. Silverman, will, on demand, redeliver the attached property credits and effects so released to the proper officer, to be applied to the payment of such judgment, or in default thereof, that said Defendants San Francisco Iron & Metal Company, a corporation, H. Silverman and L. Silverman, will, on demand, pay to the Plaintiff the full value of the property credits and effects released, not exceeding the amount of such judgment.

IN WITNESS WHEREOF, the corporate seal and name of the said surety company is hereto affixed at San Francisco, California, by its duly authorized Attorney in Fact, this 14th day of February, A. D. 1929.

THE CENTURY INDEMNITY COMPANY
By F. J. CRISP
Attorney in Fact
F. J. Crisp" [Seal]

IV.

That thereafter, on the 14th day of February, 1929, said bond was amended as hereinafter mentioned and a stipulation was entered into as follows:

"In the Superior Court of the State of California in and for the City and County of San Francisco

No. 204668

V. BERGES,

Plaintiff,

vs.

N. ABRAHAM, et al.,

Defendants.

STIPULATION

IT IS HEREBY STIPULATED AND AGREED between plaintiff, [22] defendants San Francisco Iron & Metal Company, a corporation, H. Silberman, Sr., H. Silberman, Jr. and L. Silberman and the Century Indemnity Company, as follows:

1. That the bond of the Century Indemnity Company dated February 14, 1929, be and it is hereby corrected so as to change "Silverman" to "Silberman."

2. That for the purposes of said bond, the plaintiff has before February 14, 1929, attached property, credits and effects of each of said four defendants of the then value of $6,000.00 each.

3. That said bond supersedes and takes the place of the Century Indemnity Company bond heretofore filed in the above matter and said

former bond is hereby declared to be null and void and without effect.

Dated: February 14, 1929.

ROBERT E. HATCH,
Attorney for Plaintiff
LOUIS E. GOODMAN
Attorney for Defendants
THE CENTURY INDEMNITY COMPANY
By F. J. Crisp
Attorney-in Fact."

V.

That upon the issuance of said undertaking of defendant herein and the execution of the stipulation hereinbefore referred to and in consideration thereof, the Sheriff of said City and County of San Francisco released said attached property and/or credits and/or effects of said defendants and returned the same to the said defendants.

VI.

'That thereafter, on or about the 10th day of October, 1929, a joint and several judgment was rendered for the sum of Five Thousand, Six Hundred Forty-three and 65/100 ($5,643.65) Dollars, together with interest of seven per cent. (7%) thereon and costs in the amount of Sixty-nine and 90/100 ($69.90) Dollars against San Francisco Iron & Metal Company, a corporation, and the defend-

ants L. Silberman and N. Abraham in favor of the plaintiff [23] V. Berges in said action numbered 204,668; that said judgment has not been reversed or modified and has become final, and is in terms and figures as follows:

"This cause coming on regularly to be heard and after the evidence was introduced and argument had by counsel for the respective parties, the Court made and filed its findings of fact and conclusions of law. Pursuant thereto, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

(1) That plaintiff, V. Berges, do have and recover from the defendants, N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as co-partners doing business under the name of N. Abraham Mercantile Company, the sum of Five Thousand Six Hundred Forty-three and 65/100 ($5,643.65) Dollars, together with her costs of action taxed at $69.90.

(2) That defendants take nothing by reason of their counter claim and cross-complaint.

Dated: October 10, 1929."

VII.

That on or about the 21st day of February, 1930, the plaintiff V. Berges for the sum of Five Thousand Eight Hundred Twenty-seven and 96/100 Dol-

lars ($5,827.96) sold, assigned and transferred to the plaintiff herein, G. Nelson, the said judgment for the full use and benefit of the plaintiff herein G. Nelson in trust for the Fidelity & Casualty Company of New York; that plaintiff ever since has been and is now the holder of said judgment in trust for the Fidelity and Casualty Company of New York; that said judgment is recorded in Judgment Book 305 at page 67 in the Office of the Clerk of said Superior Court of the State of California, in and for the City and County of San Francisco, and remains fully unsatisfied.

VIII.

That after the judgment in said action #204668 became final in favor of V. Berges and prior to the commencement of this action, a writ of execution against defendant L. Silberman was [24] issued to the Sheriff of the County of Los Angeles, State of California, where L. Silberman then resided, and said execution was returned by the said Sheriff wholly unsatisfied; that prior to the commencement of this action the San Francisco Iron & Metal Company, a corporation, became bankrupt and bankruptcy proceedings are now pending in the United States District Court in and for the Northern District of California; that prior to the commencement of this action, claim was duly filed in said bankruptcy proceedings by plaintiff herein for payment of said judgment hereinbefore referred

to, but neither said claim nor any part thereof has been paid.

IX.

That the undertaking on release of attachment hereinbefore referred to in Paragraph III was furnished in action No. 204668 and the persons named in said bond as "H. Silverman and L. Silverman" were and are the same persons as referred to and mentioned in paragraph IV herein as "H. Silberman and L. Silberman"; that during the course of the trial of said action No. 204668 by V. Berges, the pleadings were amended so as to change the names "H. Silverman and L. Silverman" to "H. Silberman and L. Silberman" upon order of the above entitled court.

X.

That when V. Berges assigned said judgment to the plaintiff G. Nelson as found in paragraph VII hereof, said V. Berges also delivered to said G. Nelson said bond or undertaking set forth in paragraph III hereof, and G. Nelson ever since has been and now is the holder thereof in trust for the Fidelity and Casualty Company of New York.

XI.

That on or about the 26th day of February, 1929, the [25] Fidelity and Casualty Company of New York on behalf solely of another defendant N. Abra-

ham in said action mentioned in paragraph II of these findings issued and delivered to said plaintiff V. Berges a bond on release of attachment in similar terms to the bond or undertaking on release of attachment mentioned in paragraph III of these findings, and that said bond related solely to the property, credits, and effects of said defendant N. Abraham and related solely to the recovery of judgment in said action against said defendant N. Abraham; that thereupon plaintiff in said action in consideration of the execution and delivery of said bond or undertaking to the plaintiff directed the sheriff to release, and the sheriff did release the attachment theretofore levied in said action against the property, credits, and effects of said defendant N. Abraham; that when the plaintiff V. Berges assigned said judgment to said G. Nelson as found in paragraph VII of these findings, said V. Berges also delivered to said G. Nelson said bond or undertaking on release of attachment executed as aforesaid by said Fidelity and Casualty Company of New York, and thereafter said G. Nelson delivered said bond or undertaking to said Fidelity and Casualty Company of New York. That the said payment made by G. Nelson to V. Berges as set forth in finding No. VII herein was made by the Fidelity and Casualty Company of New York by and through G. Nelson and was pursuant to and in fulfillment of its obligation so to do under its said bond and undertaking for release of at-

tachment issued for N. Abraham, one of the judgment debtors in the judgment in the case of Berges vs. Abraham, et al., as set forth in finding VI herein.

XII.

That the said Fidelity and Casualty Company of New York is the real party in interest herein, and the plaintiff herein rep[26]resents only the interests of the said Fidelity and Casualty Company of New York and is entitled to recover the amounts only which the Fidelity and Casualty Company of New York could and should recover by way of contribution or reimbursement, and no more. That the defendant was the surety of San Francisco Iron and Metal Company, a corporation, and L. Silberman, who were joint debtors and joint adventurers with N. Abraham and who were held jointly and severally liable with N. Abraham for the judgment rendered in the case of V. Berges vs. N. Abraham, et al. as found in finding No. VI herein; that the Fidelity and Casualty Company of New York was the surety of said N. Abraham, one of the joint debtors in the said judgment rendered in Berges vs. N. Abraham, et al. as found in finding No. VI herein.

XIII.

That the Century Indemnity Company and the Fidelity and Casualty Company of New York are

not sureties of the same principal nor for the same obligation, and neither L. Silberman, San Francisco Iron and Metal Company nor Century Indemnity Company were a principal under the bond and undertaking of Fidelity and Casualty Company of New York referred to in finding XI herein.

XIV.

That the debt which formed the subject matter of the judgment in the action of Berges vs. Abraham, et al. as found in paragraph IV was incurred by N. Abraham for and on behalf of N. Abraham Mercantile Company, a trade name under which the said N. Abraham carried on business prior to November 1, 1926. That the San Francisco Iron & Metal Company was a co-partner with the said N. Abraham from and after November 1, 1926 and did business as such joint adventurers and partners under the said name of N. Abraham Mercantile Company from November 1, 1926 to December 1, [27] 1927, at which time said partnership and joint adventure was dissolved. That it was agreed between said partners that the San Francisco Iron and Metal Company would pay the debts contracted on behalf of the partnership but it was not agreed that the San Francisco Iron and Metal Company would pay any of the antecedent debts of N. Abraham contracted prior to November 1, 1926; that the debt which formed the subject matter of the judgment sued on herein was a personal

debt of N. Abraham contracted prior to November 1, 1926 and that it is not true that the San Francisco Iron and Metal Company agreed to save harmless N. Abraham of and from his obligation to pay said antecedent debt. That finding IVa of the findings of fact in said action of Berges vs. Abraham, et al., to the effect that the said San Francisco Iron and Metal Company agreed to pay the said debt which formed the subject matter of said action was not an issue between the plaintiff and the defendants in said action, and the judgment in said action as found in finding VI herein is not in accord with said finding and is contrary to said finding.

CONCLUSIONS OF LAW

1. That plaintiff may recover under the assignment of the judgment as pleaded only to the extent that the Fidelity and Casualty Company of New York could recover and that as to all amounts over and above such recovery the said judgment must be deemed to be satisfied by the payment made by the said Fidelity and Casualty Company.

2. That there was and is no co-suretyship existing between the defendant Century Indemnity Company and the Fidelity and Casualty Company of New York, and that the plaintiff herein is not entitled to recover for and on behalf of the said Fidelity and [28] Casualty Company of New York by way of reimbursement or contribution from the

defendant; that plaintiff cannot recover from defendant under the assignment of the judgment in Berges vs. Abraham, et al. except by way of contribution or reimbursement.

3. That the judgment in Berges vs. Abraham, et al. is res adjudicata between the defendants therein only as joint debtors and that contribution under said judgment exists between said joint debtors ratable and in equal proportions; that L. Silberman is insolvent and plaintiff, on behalf of Fidelity and Casualty Company of New York and of its principal, N. Abraham, is entitled to a judgment against San Francisco Iron and Metal Company in amount of 50% of the payment made on said judgment with interest from said date, that is, in the amount of $2913.98, with interest at seven per cent. (7%) from February 21, 1930.

4. That plaintiff is not entitled to contribution or reimbursement from defendant and that defendant is entitled to judgment against plaintiff for its costs.

Judge of the United States District Court.

[Endorsed]: Lodged June 11, 1934 [29]

[Title of Court and Cause.]

SPECIAL FINDINGS AND CONCLUSIONS OF LAW

That at all times herein mentioned the defendant

THE CENTURY INDEMNITY COMPANY was and now is a corporation organized and existing under the laws of the State of Connecticut and duly authorized and licensed to do a general surety business in the State of California.

II.

That on or about the 9th day of February, 1929, one V. BERGES, filed an action in the Superior Court of the State of California, in and for the City and County of San Francisco, against SAN FRANCISCO IRON & METAL COMPANY, a corporation, L. SILBERMAN, H. SILBERMAN, and N. ABRAHAM, said action being numbered 204668 therein; that thereupon in said action a writ of attachment was issued and levied against the property, credits and effects of the defendants SAN FRANCISCO IRON & METAL COMPANY, a corporation, H. SILBERMAN, and L. SILBERMAN, as security for the satisfaction of any judgment that might be recovered by plaintiff V. BERGES, and certain property, credits and effects of each of said defendants in excess of the value of $6,000.00 for each of said defendants were attached and seized by the Sheriff of the said City and County of San Francisco pursuant to said Writ of Attachment.

III.

That thereafter, on or about the 14th day of

February, 1929, the defendant THE CENTURY INDEMNITY COMPANY made, executed and delivered its undertaking on release of the attachment herein mentioned, as follows: [30]

"In the Superior Court of the State of California in and for the City and County of San Francisco

V. Berges,

Plaintiff,

-vs-

SAN FRANCISCO IRON & METAL COMPANY, a corporation, H. SILVERMAN and L. SILVERMAN,

Defendants.

UNDERTAKING ON RELEASE OF ATTACHMENT

WHEREAS, the above named Plaintiff commenced an action in the Superior Court of the City and County of San Francisco, State of California, against the above named Defendants claiming that there was due to said Plaintiff from said Defendants the sum of Four Thousand Seven Hundred Nine and 61/100 ($4,709.61) Dollars, or thereabouts, and thereupon an attachment issued against the property, credits and effects of Defendants, SAN FRANCISCO IRON & METAL COMPANY, a corporation, H. SILVERMAN and L. SILVERMAN, as security for the satisfaction of

any judgment that might be recovered therein; and certain property credits and effects of the said Defendants, SAN FRANCISCO IRON & METAL COMPANY, a corporation, H. SILVERMAN and L. SILVERMAN, have been attached and seized by the Sheriff of the said City and County, under and by virtue of the said writ:

AND WHEREAS, the said Defendants, SAN FRANCISCO IRON & METAL COMPANY, a corporation, H. SILVERMAN and L. SILVERMAN, are desirous of having said property credits and effects released from said attachment,

NOW THEREFORE, the undersigned, THE CENTURY INDEMNITY COMPANY, Hartford, Connecticut, a corporation organized and existing under the laws of the State of Connecticut, and duly authorized and licensed to do a general surety business in the State of California, in consideration of the premises, and also in consideration of the release from said attachment of the property credits and effects attached, as above mentioned, does hereby undertake in the sum of Six Thousand and no/100 ($6,000.00) Dollars, and promise that in case the Plaintiff recovers judgment in the action against Defendants, SAN FRANCISCO IRON & METAL COMPANY, a corporation, H. SILVERMAN and L. SILVERMAN, said

Defendants, SAN FRANCISCO IRON & METAL COMPANY, a corporation, H. SILVERMAN and L. SILVERMAN, will, on demand, redeliver the attached property credits and effects so released to the proper officer, to be applied to the payment of such judgment, or in default thereof, that said Defendants, SAN FRANCISCO IRON & METAL COMPANY, a corporation, H. SILVERMAN and L. SILVERMAN, will, on demand, pay to the Plaintiff the full value of the property [31] credits and effects released, not exceeding the amount of such judgment.

IN WITNESS WHEREOF, the corporate seal and name of the said Surety Company is hereto affixed at San Francisco, California, by its duly authorized Attorney in Fact, this 14th day of February, A. D. 1929.

THE CENTURY INDEMNITY COMPANY

[Seal] By F. J. CRISP
Attorney in Fact
F. J. Crisp"

IV.

That thereafter, on the 14th day of February, 1929, said bond was amended as hereinafter mentioned and a stipulation was entered into as follows:

"In the Superior Court of the State of California in and for the City and County of San Francisco.

No. 204668

V. BERGES,

Plaintiff,

-vs-

N. ABRAHAM, et al.,

Defendants.

STIPULATION

IT IS HEREBY STIPULATED AND AGREED between plaintiff, defendants San Francisco Iron & Metal Company, a corporation, H. Silberman, Sr., H. Silberman, Jr., and L. Silberman and the Century Indemnity Company, as follows:

1. That the bond of the Century Indemnity Company dated February 14, 1929, be and it is hereby corrected so as to change "Silverman" to "Silberman."

2. That for the purposes of said bond, the plaintiff has before February 14, 1929, attached property, credits and effects of each of said four defendants of the then value of $6,000.00 each.

3. That said bond supersedes and takes the place of the Century Indemnity Company bond heretofore filed in the above matter and said

former bond is hereby declared to be null and void and without effect.

Dated: February 14, 1929.

ROBERT E. HATCH,
Attorney for Plaintiff
LOUIS E. GOODMAN
Attorney for Defendants
THE CENTURY INDEMNITY COMPANY,
By—F. J. Crisp
Attorney in Fact." [32]

V.

That upon the issuance of said undertaking of defendant herein and the execution of the stipulation hereinbefore referred to and in consideration thereof, the Sheriff of said City and County of San Francisco released said attached property and/or credits and/or effects of said defendants and returned the same to the said defendants.

VI.

That thereafter, on or about the 10th day of October, 1929, judgment was rendered for the sum of Five Thousand Six Hundred Forty-three and 65/100 ($5,643.65) Dollars, together with legal interest thereon and costs in the amount of Sixty-nine and 90/100 ($69.90) Dollars against SAN FRANCISCO IRON & METAL COMPANY, a corporation, and the defendants L. SILBERMAN

and N. ABRAHAM in favor of the plaintiff V. BERGES in said action numbered 204,668; that said judgment has not been reversed or modified and has become final and is wholly unpaid and unsatisfied.

VII.

That on or about the 21st day of February, 1930, the plaintiff V. BERGES for the sum of Five Thousand Eight Hundred Twenty-seven and 96/100 Dollars ($5,827.96) sold, assigned and transferred to the plaintiff herein, G. NELSON, the said judgment for the full use and benefit of the plaintiff herein G. NELSON in trust for the Fidelity & Casualty Company of New York; that plaintiff is now the legal owner and holder of said judgment; that there is now due, owing and unpaid to plaintiff herein said sum of Five Thousand Six Hundred Forty-three and 65/100 Dollars ($5,643.65), together with costs in the amount of Sixty-nine and 90/100 Dollars ($69.90) and interest thereon at the rate of seven per cent (7%) from the date of said judgment; that said judgment is recorded in Judgment [33] Book 305 at page 67 in the Office of the Clerk of said Superior Court of the State of California, in and for the City and County of San Francisco, and remains fully unsatisfied.

VIII.

That after the judgment in said action #204668

became final in favor of V. Berges and prior to the commencement of this action, a Writ of Execution against defendant L. Silberman was issued to the Sheriff of the County of Los Angeles, State of California, where L. Silberman then resided, and said execution was returned by the said Sheriff wholly unsatisfied; that prior to the commencement of this action the San Francisco Iron & Metal Company, a corporation, became bankrupt and bankruptcy proceedings are now pending in the United States District Court in and for the Northern District of California; that prior to the commencement of this action, claim was duly filed in said bankruptcy proceedings by plaintiff herein for payment of said judgment hereinbefore referred to, but neither said claim nor any part thereof has been paid.

IX.

That the attachment hereinbefore mentioned against said defendants was not dissolved or modified prior to the issuance of said undertaking on release of attachment and said attachment was at all the times herein mentioned and now is in full force and effect, save and except that the attached property and/or credits and/or effects were released to said defendants by said Sheriff of the City and County of San Francisco upon and in consideration of the undertaking hereinbefore referred to.

X.

That the undertaking on release of attachment herein- [34] before referred to in Paragraph III was furnished in action No. 204668 and the persons named in said bond as "H. Silverman and L. Silverman" were and are the same persons as referred to and mentioned in Paragraph IV herein as "H. Silberman and L. Silberman"; that during the course of the trial of said action No. 204668 by V. Berges, the pleadings were amended so as to change the names "H. SILVERMAN and L. SILVERMAN" to "H. SILBERMAN and L. SILBERMAN" upon order of the above entitled court.

XI.

That when V. BERGES assigned said judgment to the plaintiff G. NELSON as found in paragraph VII hereof, said V. BERGES also delivered to said G. NELSON said bond of undertaking set forth in paragraph III hereof, and G. NELSON ever since has been and now is the owner and holder thereof in trust for the Fidelity and Casualty Company of New York.

XII.

That in said action entitled V. BERGES vs. SAN FRANCISCO IRON AND METAL COMPANY which is mentioned in paragraph II of

these Findings, the plaintiff alleged by amendment to her complaint, and the defendants H. Silberman, L. Silberman and San Francisco Iron & Metal Company, a corporation, in answer to said amendment to the complaint denied, as follows:

> "That prior to the commencement of this action and for good and valuable consideration, defendant San Francisco Iron & Metal Company, a corporation, agreed to and did assume all of the obligations and liabilities of said N. Abraham Mercantile Company and of N. Abraham, H. Silberman, 1st Doe to 10th Doe individually and as copartners doing business under the name of N. Abraham Mercantile Company; that about October, 1927, defendant San Francisco Iron & Metal Company received all or practically all of the property and assets of the other defendants in this paragraph mentioned and, in consideration thereof and other valuable considerations, specially promised and agreed to apply the said property and assets to the payment of the claim and matters herein sued for, but that said def- [35] endant San Francisco Iron & Metal Company has wholly failed to do."

XIII.

That thereafter the court in said action after the trial thereof made and entered its Findings of Fact:

"That prior to the commencement of this action and for good and valuable consideration, defendant San Francisco Iron & Metal Company, a corporation, agreed to and did assume all of the obligations and liabilities of said N. Abraham Mercantile Company and of N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as co-partners doing business under the name of N. Abraham Mercantile Company; that prior to the commencement of this action, defendant San Francisco Iron & Metal Company, a corporation, received all or practically all of the property and assets of the N. Abraham Mercantile Company and of N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as co-partners doing business under the name of N. Abraham Mercantile Company, and in consideration thereof and other valuable considerations specially promised and agreed to apply said property and assets to the payment of the said indebtedness to the said Goodyear Redwood Lumber Company, but that said defendant San Francisco Iron & Metal Company has wholly failed to do so."

XIV.

That the terms of said Judgment so rendered in said action are as follows:

"This cause coming on regularly to be heard and after the evidence was introduced and argument had by counsel for the respective parties, the Court made and filed its findings of fact and conclusions of law. Pursuant thereto, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

(1) That plaintiff, V. Berges, do have and recover from the defendants, N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as co-partners doing business under the name of N. Abraham Mercantile Company, the sum of Five Thousand Six Hundred Forty-three and 65/100 ($5,643.65) Dollars, together with her costs of action taxed at $69.90. [36]

(2) That defendants take nothing by reason of their counter claim and cross-complaint.

Dated: October 10, 1929."

XV.

That on or about the 26th day of February, 1929, the Fidelity and Casualty Company of New York on behalf solely of another defendant N. Abraham in said action mentioned in paragraph II of these

Findings issued and delivered to said plaintiff V. Berges a bond on release of attachment in similar terms to the bond or undertaking on release of attachment mentioned in paragraph III of these Findings, and that said bond related solely to the property, credits, and effects of said defendant N. Abraham and related solely to the recovery of judgment in said action against said defendant N. Abraham; that thereupon plaintiff in said action in consideration of the execution and delivery of said bond or undertaking to the plaintiff directed the sheriff to release, and the sheriff did release the attachment theretofore levied in said action against the property, credits, and effects of said defendant N. Abraham; that when the plaintiff V. Berges assigned said judgment to said G. Nelson as found in paragraph VII of these Findings, said V. Berges also delivered to said G. Nelson said bond or undertaking on release of attachment executed as aforesaid by said Fidelity and Casualty Company of New York, and thereafter said G. Nelson delivered said bond or undertaking to said Fidelity and Casualty Company of New York.

XVI.

That on the trial of this action plaintiff herein has tendered to the defendant and has delivered to the Clerk of this court for the benefit of the defendant for delivery to defendant upon payment of any judgment herein rendered in plaintiff's favor against defendant an assignment by plain-

tiff to defendant of the claim of the plaintiff against the San [37] Francisco Iron & Metal Company, a corporation, in bankruptcy.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact the court concludes that judgment should be entered in favor of the plaintiff and against the defendant in the sum of Six Thousand ($6000.00) Dollars together with interest thereon at the legal rate of seven per cent (7%) per annum from the date of the commencement of this action, to-wit: September 24, 1931, together with plaintiff's costs of suit incurred herein, and that upon satisfaction of said Judgment the Clerk of this court should deliver to the defendant the assignment by plaintiff to defendant of claim of plaintiff against the San Francisco Iron & Metal Company, a corporation in bankruptcy.

Let judgment be entered accordingly.

Dated: June 16th, 1934.

FRANK H. KERRIGAN
United States District Judge.

[Endorsed]: Receipt of a copy of the within SPECIAL FINDINGS AND CONCLUSIONS OF LAW is hereby admitted this 6th day of June 1934.

R. P. WISECARVER
REDMAN, ALEXANDER & BACON
Attorneys for Defendant.

[Endorsed]: Filed Jun 16 1934 [38]

In the Southern Division of the United States District Court for the Northern District of California.

No. 19086-K

G. NELSON,

Plaintiff,

-vs-

THE CENTURY INDEMNITY COMPANY,

Defendant.

JUDGMENT ON FINDINGS

This cause came on regularly for trial upon the 16th day of May, 1934, before the Court sitting without a Jury, a trial by Jury having been waived by written stipulation filed; Don Hadsell, Esq., appearing as attorney for plaintiff, and R. P. Wisecarver, Esq., appearing as attorney for defendant, and the trial having been proceeded with on the 21st day of May, 1934, and oral and documentary evidence upon behalf of the respective parties having been introduced and closed, and the cause having been submitted to the Court for consideration and decision, and the Court, after due deliberation, having rendered its decision and filed its findings, and ordered that judgment be entered in accordance with said findings:

Now, therefore, by virtue of the law and by reason of the Findings aforesaid, it is adjudged by the Court that G. Nelson, Plaintiff, do have and

recover of and from said The Century Indemnity Company, Defendant, the sum of Six Thousand (6,000.00) Dollars, together with interest thereon at the legal rate of seven per cent (7%) per annum from the date of the commencement of this action, to-wit: September 24, 1931, together with plaintiff's costs of suit incurred herein, and that upon satisfaction of said Judgment the Clerk of this court should deliver to the defendant the assignment by plaintiff to defendant of claim of plaintiff against the San Francisco Iron & Metal Company, a corporation in bankruptcy. Costs taxed at $58.10.

Judgment entered this 16th day of June, 1934.

WALTER B. MALING,
Clerk. [39]

[Title of Court and Cause.]

To the above entitled Court and to the above named Plaintiff, and to MESSRS. HADSELL, SWEET, INGALLS & LAMB, her attorneys:

YOU WILL PLEASE TAKE NOTICE that hereunto attached is a proposed bill of exceptions as proposed by the defendant in the above entitled action.

Dated: August 21, 1934.

J. ALEXANDER
W. C. BACON
REDMAN, ALEXANDER & BACON
R. P. WISECARVER
Attorneys for Defendant.

Receipt of the within proposed bill of exceptions is hereby admitted this 21st day of August, 1934.

HADSELL, SWEET, INGALLS
& LAMB
Attorneys for Plaintiff. [40]

[Title of Court and Cause.]

BILL OF EXCEPTIONS

The above entitled action regularly came on for trial on the 16th day of May, 1934 at 10:00 o'clock A. M. in the above entitled Court, in the Post Office Building, Seventh and Mission Streets, in the City and County of San Francisco, State of California, and at that time D. Hadsell, Esq. of the firm of Messrs. Hadsell, Sweet, Ingalls & Lamb, appeared as attorney for the plaintiff, and R. P. Wisecarver, Esq. appeared as attorney for the defendant. Thereupon the following proceedings were had:

The Court was advised by respective counsel that the cause had been tried previously and had been on appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, and was by said Court remanded for a new trial.

THE COURT: It will not take very long. You have got the evidence in the former case, haven't you?

MR. WISECARVER: That is available. However, there is some more evidence to be taken, and

I particularly want to make objection to the incorporation into the record, and argue that at some length, if necessary, of some of the evidence that was put in before because I do not think it is relevant to this pro- [41] ceeding.

* * * * * * * * *

THE COURT: I think we had better take what evidence you have and let you stipulate that the former evidence may be admitted in this case, subject to any objections that were made at the time.

MR. HADSELL: I am perfectly willing to try the case that way.

THE COURT: Any other objections you care to make?

MR. WISECARVER: In that connection I want to make an objection, if Your Honor please, specifically to the incorporation into this record of the entire judgment roll in the case of Berges vs. Abraham, et al.

THE COURT: Did you make that objection before?

MR. WISECARVER: I made that objection before but the Court overruled the objection.

THE COURT: I said subject to the objections that have been made.

MR. WISECARVER: I want to ask Your Honor to rule upon that at this time.

THE COURT: I do not want to rule upon it now. I will rule upon it later. I do not want to go over all of this now.

MR. WISECARVER: I would like to make my objection specific in that connection.

THE COURT: Very well, proceed.

MR. WISECARVER: The suit here is on a judgment. This is an assignment of a judgment. The only thing that they are entitled to put in evidence and that is relevant to that assignment is the judgment. The judgment does not reflect all of the findings, nor are all of the findings germane to the judgment or [42] germane to any issue in that case. I refer particularly to the so-called finding No. 4a of the Berges v. Abraham case. Now, it being numbered 4a, indicates that it was inserted into that finding. The Court has attempted, apparently, to settle the question of rights between the defendants, which was not in issue between the plaintiff and the defendant in that case, by trying to find there that there were certain contractual rights existing between the San Francisco Iron & Metal Company and the other partners. That is not reflected in that judgment on which they are suing, at all. The judgment merely reads this way.

THE COURT: You say it is not. You need not read that judgment.

MR. WISECARVER: It is just against the partners, individually, and as joint adventurers, that is all. It does not give any priority of right against the San Francisco Iron & Metal Company.

THE COURT: You say you object to that.

MR. WISECARVER: Yes. And I want to call your Honor's attention to the fact that the authori-

ties are clear that that is not relevant evidence in this case, in an action on the judgment, because it is not res adjudicata between the parties here, it cannot be relevant unless it does establish the rights between the parties. These parties were joint defendants in the action below, they could not have appealed from that finding, because it was not reflected in that judgment, which merely held they were joint adventurers and partners, individually and jointly, and the rule is stated in 15 Cal. Juris. at page 153, which says, "A judgment is not conclusive as to matters not material and traversable. It does not operate as an estoppel upon immaterial issues not essential thereto, even though findings have been made upon [43] them. Findings which were not necessary to the judgment are not conclusive. An issue and finding is immaterial or collateral if the judgment is in no way dependent upon it."

And again:

"A finding outside the issues, and which does not enter into or form the basis of the judgment is not conclusive, since 'it is the judgment and not the preliminary determination of the court or jury which creates the estoppel'".

Citing many cases there.

THE COURT: You are going to brief the case, aren't you?

MR. WISECARVER: Yes, unless your Honor wishes to have it argued orally.

THE COURT: Orally would suit me, and have the reporter transcribe the argument. I would prefer that to briefs. That is up to you. The objection is overruled and an exception noted. Is all of the evidence taken on the former trial admitted in evidence, subject to the objections taken there and the objection just made?

MR. HADSELL: As far as the plaintiff is concerned, yes.

MR. WISECARVER: I think that is correct. Is there a copy of the transcript on file in this case?

THE COURT: Yes, the Clerk just handed it to me.

MR. WISECARVER: That is not the transcript of the evidence in the record on appeal?

THE COURT: That is a transcript of the record.

MR. HADSELL: I guess there is no question about this, that the Century Indemnity Company had not yet paid anything on account of this claim?

MR. WISECARVER: That is correct. [44]

Thereupon the transcript of testimony at the previous trial, together with the exhibits in connection therewith, was received into evidence as follows:

"THE COURT: There is one phase of the answer that I would like to have amplified a little by defendant's counsel, and that is the feature of another bond having been given.

MR. WISECARVER: That is this, Your Honor: The real party in interest in this suit is the Fidelity & Casualty Company of New York. They gave a release of attachment bond in the same suit for Abraham, who is one of the copartners, to effect the same purpose that The Century Indemnity Company did. The Fidelity & Casualty Company paid that bond, that is, they satisfied that judgment, taking a satisfaction in the name of Miss Nelson. It is our contention that the purchase of the judgment by the surety obligated to pay it is a satisfaction of the judgment, or at least it gives them no greater right than contribution.

THE COURT: You claim a contribution?

MR. WISECARVER: There will be several claims made as the case proceeds, Your Honor. Our claim is that at most it would be a contribution.

THE COURT: You are not claiming exoneration?

MR. WISECARVER: Yes, we are claiming that, too. There are several claims that we make. We claim that it is not a legal assignment.

MR. HADSELL: And we claim that there was no co-suretyship here, Your Honor, even granting all that Mr. Wisecarver has said. The primary party liable was the defendant who put up the bond. Whatever may be the facts with reference to what Mr. Wisecarver [45] has said, since it is not a co-suretyship we are the full owner of the judgment, and, therefore, entitled to the full payment.

The plaintiff thereupon offered in evidence the judgment roll in an action in the Superior Court of the State of California, in and for the City and County of San Francisco, numbered 204,568 therein. The defendant objected to the introduction of said judgment roll in evidence upon the ground that "the only thing entitled to go into the record is the judgment on which they are suing, not the judgment roll". The Court overruled the objection. The defendant noted an exception, to which the Court acceded. Thereupon said judgment roll was received in evidence.

The complaint, amendment to complaint, answer and cross-complaint of defendant, order permitting filing of cross-complaint against Goodyear Redwood Lumber Company as cross-defendant, and answer to counterclaim and cross-complaint, as set forth in said judgment roll, were as follows:

"In the Superior Court of the State of California, in and for the City and County of San Francisco

No. 204668

V. BERGES,

Plaintiff,

vs.

N. ABRAHAM, H. SILBERMAN, L. SILBERMAN, 1st Doe, 2nd Doe, 3rd Doe, 4th Doe, 5th Doe, 6th Doe, 7th Doe, 8th Doe, 9th Doe and 10th Doe, individually and as

copartners doing business under the name of N. ABRAHAM MERCANTILE COMPANY, Black-White Company, a corporation, 11th Doe, 12th Doe, 13th Doe, 14th Doe, 15th Doe, 16th Doe, 17th Doe, 18th Doe, 19th Doe and 20th Doe, individually and as copartners doing business under the name of Black-White Company; SAN FRANCISCO IRON & METAL COMPANY, a corporation; 21st Doe, 22nd Doe, 23rd Doe, 24th Doe, 25th Doe, 26th Doe, 27th Doe, 28th Doe, 29th Doe and 30th Doe, individually and as stockholders of SAN FRANCISCO IRON & METAL COMPANY, a corporation,

Defendants. [46]

COMPLAINT

Plaintiff complains and alleges:

FIRST CAUSE OF ACTION

I.

That at all times herein concerned defendants, N. Abraham, H. Silberman, L. Silberman and 1st Doe to 10th Doe were copartners doing business under the name of N. Abraham Mercantile Company; that at all times herein concerned defendant, San Francisco Iron & Metal Company, was a corporation duly organized and existing under and by virtue of the laws of the State of California.

II.

That the true names of 1st Doe to 10th Doe inclusive sued individually and as copartners doing business under the name of N. Abraham Mercantile Company, Black-White Company, a corporation, 11th Doe to 20th Doe inclusive, sued individually and as co-partners doing business under the name of Black-White Company, and 21st Doe to 30th Doe inclusive, sued individually and as stockholders of San Francisco Iron & Metal Company, a corporation, are unknown to plaintiff and they are therefore sued by such names which are fictitious.

III.

That at all times herein concerned, Goodyear Redwood Lumber Company was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Maine and lawfully operating and transacting business in the State of California.

IV.

That within four years next preceding the commencement of this action, defendants became indebted to Goodyear Redwood Lumber Company in the State of California in the sum of Forty-seven Hundred Nine and 61/100 Dollars ($4709.61) upon a mutual, open and current book account as and for a balance due for

steel rails sold and delivered by Goodyear Redwood Lumber Company to defendants.

V.

That prior to the commencement of this action, said Goodyear Redwood Lumber Company sold, transferred and assigned to the plaintiff all of its right, title and interest in and to the claim hereinabove set forth and that plaintiff is still the owner and holder thereof.

VI.

That plaintiff has demanded and hereby does demand of defendants the said sum of $4709.61, but that at all times herein concerned defendants have refused and now do refuse to pay to plaintiff said last mentioned sum; all to plaintiff's damage [47] in the sum of $4709.61, all of which is due, owing and unpaid from defendants to plaintiff.

SECOND CAUSE OF ACTION

I.

Plaintiff hereby refers to and incorporates herein paragraphs I, II, and III, of the first cause of action, the same as if here set forth in full.

II.

That within two years next preceding the

commencement of this action, defendants became indebted to Goodyear Redwood Lumber Company in the State of California in the sum of Forty-seven Hundred Nine and 61/100 Dollars ($4709.61) as and for the reasonable value of steel rails sold and delivered to defendants by Goodyear Redwood Lumber Company.

III.

That prior to the commencement of this action, said Goodyear Redwood Lumber Company sold, transferred and assigned to the plaintiff all of its right, title and interest in and to the claim hereinabove set forth and that plaintiff is still the owner and holder thereof.

IV.

That plaintiff has demanded and hereby does demand of defendants the said sum of $4709.61, but that at all times herein concerned defendants have refused and now do refuse to pay to plaintiff said last mentioned sum; all to plaintiff's damage in the sum of $4709.61, all of which is due, owing and unpaid from defendants to plaintiff.

THIRD CAUSE OF ACTION

I.

Plaintiff hereby refers to and incorporates

herein paragraphs I, II and III of the first cause of action, the same as if here set forth in full.

II.

That within two years next preceding the commencement of this action, defendants agreed to immediately pay Goodyear Redwood Lumber Company the sum of $4709.61 for and in consideration of the sale and delivery by Goodyear Redwood Lumber Company to defendants of certain steel rails; that Goodyear Redwood Lumber Company did sell and deliver said steel rails to defendant.

III.

That prior to the commencement of this action, said Goodyear Redwood Lumber Company sold, transferred and assigned to the plaintiff all of its right, title and interest in and to the [48] claim hereinabove set forth and that plaintiff is still the owner and holder thereof.

IV.

That plaintiff has demanded and hereby does demand of defendants the said sum of $4709.61, but that at all times herein concerned defendants have refused and now do refuse to pay to plaintiff said last mentioned sum; all to plaintiff's damage in the sum of $4709.61, all of

which is due, owing and unpaid from defendants to plaintiff.

FOURTH CAUSE OF ACTION

I.

Plaintiff hereby refers to and incorporates herein paragraphs I, II, and III of the first cause of action, the same as if here set forth in full.

II.

That after the said dealings in this complaint named and before the commencement of this action, the said Goodyear Redwood Lumber Company came to a mutual accounting touching the several matters and things in this complaint mentioned; that on the said accounting, there was found due from the said defendants to said Goodyear Redwood Lumber Company, as a final balance upon said mutual dealing and matters between defendants and Goodyear Redwood Lumber Company the sum of Forty-seven Hundred Nine and 61/100 Dollars ($4709.61); and the plaintiff herein avers that the said stated account is just and true.

III.

That prior to the commencement of this action, said Goodyear Redwood Lumber Com-

pany sold, transferred and assigned to the plaintiff all of its right, title and interest in and to the claim hereinabove set forth and that plaintiff is still the owner and holder thereof.

IV.

That plaintiff has demanded and hereby does demand of defendants the said sum of $4709.61, but that at all times herein concerned defendants have refused and now do refuse to pay to plaintiff said last mentioned sum; all to plaintiff's damage in the sum of $4709.61, all of which is due, owing and unpaid from defendants to plaintiff.

WHEREFORE, plaintiff prays for judgment against said defendants and each of them in the sum of Forty-seven Hundred Nine and 61/100 Dollars ($4709.61), together with interest thereon from date hereof and costs of suit; and for such other and further relief as may be meet in the premises.

ROBERT E. HATCH
Attorney for Plaintiff. [49]

State of California,
City and County of San Francisco—ss.

V. BERGES, being first duly sworn, deposes and says:

That she is the plaintiff in the above-entitled action; that she has read the foregoing Complaint and knows the contents thereof and that

the same is true of her own knowledge, except those matters which are therein stated on information or belief and that, as to such matters, she believes it to be true.

V. BERGES

Subscribed and sworn to before me this 6th day of February, 1929.

[Seal] DAISY CROTHERS WILSON
Notary Public in and for the City and County of San Francisco, State of California."

"In the Superior Court of the State of California in and for the City and County of San Francisco.

No. 204668

V. BERGES,

Plaintiff,

vs.

N. ABRAHAM, et al.,

Defendants.

AMENDMENT TO COMPLAINT

For amendment to the complaint on file herein plaintiff further complains and alleges, as paragraphs IV-a of the first cause, II-a of the second cause, II-a of the third cause and II-a of the fourth cause:

That prior to the commencement of this action and for good and valuable consideration, defendant SAN FRANCISCO IRON &

METAL COMPANY, a corporation, agreed to and did assume all of the obligations and liabilities of said N. ABRAHAM MERCANTILÆ COMPANY and of N. ABRAHAM, H. SILBERMAN, 1st Doe to 10th Doe individually and as copartners doing business under the name of N. ABRAHAM MERCANTILE COMPANY; that about October, 1927, defendant SAN FRANCISCO IRON & METAL COMPANY received all or practically all of the property and assets of the other defendants in this paragraph mentioned and, in consideration thereof and other valuable considerations, specially promised and agreed to apply the said property and assets to the [50] payment of the claim and matters herein sued for, but that said defendant SAN FRANCISCO IRON & METAL COMPANY has wholly failed to do.

ROBERT E. HATCH
Attorney for Plaintiff."

"In the Superior Court of the State of California in and for the City and County of San Francisco.

No. 204668

V. BERGES,

Plaintiff,

vs.

N. ABRAHAM, H. SILBERMAN, L. SIL-

BERMAN, 1st Doe, 2nd Doe, 3rd Doe, 4th Doe, 5th Doe, 6th Doe, 7th Doe, 8th Doe, 9th Doe, and 10th Doe, individually and as co-partners doing business under the name of N. ABRAHAM MERCANTILE COMPANY, Black-White Company, a corporation, 11th Doe, 12th Doe, 13th Doe, 14th Doe, 15th Doe, 16th Doe, 17th Doe, 18th Doe, 19th Doe and 20th Doe, individually and as co-partners doing business under the name of Black-White Company, SAN FRANCISCO IRON & METAL COMPANY, a corporation, 21st Doe, 22nd Doe, 23rd Doe, 24th Doe, 25th Doe, 26th Doe, 27th Doe, 28th Doe, 29th Doe and 30th Doe; individually and as stockholders of SAN FRANCISCO IRON & METAL COMPANY, a corporation,

Defendants.

ANSWER

Now come defendants H. Silberman, L. Silberman and San Francisco Iron & Metal Company, a corporation, and in answer to plaintiff's complaint herein, admit, deny and allege as follows:

I.

In answer to the first cause of action set forth in said complaint, said defendants state as follows:

Said defendants admit the allegation of paragraph 1 that at all times herein concerned defendant San Francisco Iron & Metal Company was a corporation, duly organized and existing under and by virtue of the laws of the State of California, but deny that the defendants N. Abraham, H. Silberman and L. Silberman and 1st to 10th Doe were or are copartners doing business under the name of N. Abraham Mercantile Company.

Said defendants have no information sufficient to enable them to answer the allegations of paragraph 3 and basing their [51] denial on that ground, deny that Goodyear Redwood Lumber Company was or is a corporation duly organized and existing under and by virtue of the laws of the State of Maine and/or lawfully operating and transacting business in the State of California.

Said defendants have no information sufficient to enable them to answer the allegations of paragraph 5, and basing their denial on that ground, deny each and every, all and singular, the allegations of paragraph 5.

Said defendants deny each and every, all and singular, the allegations of paragraph 4, 4a and 6 of said cause of action.

II.

In answer to the SECOND cause of action set forth in said complaint, said defendants state as follows:

Answering paragraph 1, incorporating paragraphs 1, 2 and 3 of the first cause of action, said defendants incorporate herein and make a part hereof, as if fully set forth herein, their answer to paragraphs 1 and 3 of the first cause of action.

Said defendants have no information sufficient to enable them to answer the allegations of paragraph 3, and basing their denial upon that ground, deny each and every, all and singular, the allegations of paragraph 3.

Said defendants deny each and every, all and singular, the allegations of paragraph 2, 2a and 4 of said second cause of action.

III.

In answer to the THIRD cause of action set forth in said complaint, said defendants state as follows:

Answering paragraph 1, incorporating paragraphs 1, 2 and 3 of the first cause of action, said defendants incorporate herein and make a part hereof, as if fully set forth herein, their answer to paragraphs 1 and 3 of the first cause of action.

Said defendants have no information suffi-

cient to enable them to answer the allegations of paragraph 3, and basing their denial upon that ground, deny each and every, all and singular, the allegations of paragraph 3.

Said defendants deny each and every, all and singular, the allegations of paragraphs 2, 2a and 4 of said third cause of action.

IV.

In answer to the FOURTH cause of action set forth in said complaint, said defendants state as follows:

Answering paragraph 1, incorporating paragraphs 1, 2 and 3 of the first cause of action, said defendants incorporate herein and make a part hereof, as if fully set forth herein, [52] their answer to paragraphs 1 and 3 of the first cause of action.

Said defendants have no information sufficient to enable them to answer the allegations of paragraph 3, and basing their denial upon that ground, deny each and every, all and singular, the allegations of paragraph 3.

Said defendants deny each and every, all and singular, the allegations of paragraph 2, 2a and 4 of said fourth cause of action.

For a FURTHER, SEPARATE and SPECIAL DEFENSE, and by way of COUNTERCLAIM against plaintiffs, defendants allege as follows:

That on or about the 25th day of September, 1926, defendants made and entered into a contract with the Goodyear Redwood Lumber Company, plaintiff's assignor, whereby plaintiff's assignor agreed to sell and deliver to defendants and defendants agreed to purchase 698 net tons of 40-pound railroad relaying steel rails, and to pay for same at the price of $25.00 per ton.

That pursuant to said contract, defendants paid plaintiff's assignor for said 698 net tons of rail at $25.00 per ton.

That plaintiff's assignor delivered only 618 tons of said rail.

That defendant thereby overpaid plaintiff's assignor the sum of $2,000.00.

That of the rails delivered, 243 net tons were junk rail, instead of 40-pound railroad relaying rail, as called for in the contract.

That the value of said junk rail was and is $12.50 per ton and the difference in value between the said junk rail, so delivered as aforesaid, and the value of the rail required to be delivered under the terms of said contract, was and is the sum of $3075.00.

That by reason of the said delivery by plaintiff's assignor to defendants of said 243 net tons of junk rail, defendants were damaged in the sum of $3075.00.

WHEREFORE, defendants pray that plaintiff take nothing and that defendants have judgment against plaintiff in the sum of $5075.00, together with interest and costs of suit.

BROWNSTONE & GOODMAN

Attorneys for Defendants H. Silberman, L. Silberman San Francisco Iron & Metal Co."

[53]

"In the Superior Court of the State of California in and for the City and County of San Francisco.

No. 204668

V. BERGES,

Plaintiff,

vs.

N. ABRAHAM, H. SILBERMAN, et al.

Defendants.

H. SILBERMAN, L. SILBERMAN and SAN FRANCISCO IRON & METAL COMPANY, a corporation,

Defendants and Cross-Complainants

vs.

GOODYEAR REDWOOD LUMBER COMPANY, a corporation,

Cross-Defendants.

CROSS-COMPLAINT

Now come defendants and cross-complainants above named and for cause of action against cross-defendant above named, allege as follows:

1—That at all times herein mentioned San Francisco Iron & Metal Company was a corporation duly organized and existing under and by virtue of the laws of the State of California.

2—That at all times herein mentioned, the Goodyear Redwood Lumber Company was and now is a corporation, doing business in the State of California.

3—That on or about the 25th day of September, 1926, cross-complainants made and entered into a contract with the Goodyear Redwood Lumber Company, cross-defendant, whereby cross-defendant agreed to sell and deliver to cross-complainant, and cross-complainants agreed to purchase, 698 net tons of 40-pound railroad relaying steel rails, and to pay for same at the price of $25.00 per ton.

4—That pursuant to said contract cross-complainants paid cross-defendants for said 698 net tons of rail at $25.00 per ton.

5—That cross-defendant delivered only 618 tons of said rail.

6—That cross-complainants thereby overpaid cross-defendant the sum of $2,000.00.

7—That of the rails delivered, 243 net tons were junk rail instead of 40-pound railroad relaying rail, as called for in the contract.

8—That the value of said junk rail was and is $12.50 per [54] ton and the difference in value between the said junk rail so delivered as aforesaid and the value of the rail required to be delivered under the terms of said contract, was and is the sum of $3075.00.

9—That by reason of the said delivery by cross-defendant to cross-complainants of said 243 net tons of junk rail, cross-complainants were damaged in the sum of $3075.00.

10—W H E R E F O R E, cross-complainants pray for judgment against cross-defendant in the sum of $5075.00, together with interest and costs of suit.

BROWNSTONE & GOODMAN
Attorneys for Defendants and Cross-Complainants.

State of California,
City and County of San Francisco—ss.

L. H. SILBERMAN, being first duly sworn, deposes and says: that he is one of the Defendants and Cross-complainants named in the foregoing action; that he has read the foregoing answer and cross-complaint and knows the contents thereof and same is true of his own knowledge, except as to those matters therein

stated on information and belief, and as to those matters he believes it to be true.

L. H. SILBERMAN

Subscribed and sworn to before me this 23rd day of March, 1929.

[Seal] LOUIS WIENER

Notary Public in and for the City and County of San Francisco, State of California."

"In the Superior Court of the State of California in and for the City and County of San Francisco.

No. 204668

V. Berges,

Plaintiff,

vs.

N. Abraham, et al.

Defendants.

ORDER

Good cause appearing therefor, it is hereby, ORDERED, that Goodyear Redwood Lumber Company, plaintiff's assignor herein, be and the said Goodyear Redwood Lumber Company is hereby made a party to the above entitled action, and defendants be and they are hereby permitted to file a cross-complaint [55]

herein against the said Goodyear Redwood Lumber Company, as cross defendant.

Dated: March 21, 1929.

JAMES G. CONLAN
Judge."

"In the Superior Court of the State of California in and for the City and County of San Francisco.

No. 204668

V. BERGES,

Plaintiff,

vs.

N. ABRAHAM, H. SILBERMAN, et al.,

Defendants.

H. SILBERMAN, L. SILBERMAN and SAN FRANCISCO IRON & METAL COMPANY, a corporation,

Defendants and Cross-Complainants.

vs.

GOODYEAR REDWOOD LUMBER COMPANY, a corporation,

Cross-Defendant.

ANSWER TO COUNTERCLAIM

V. BERGES and GOODYEAR REDWOOD LUMBER COMPANY, answering the counterclaim on file herein, allege and deny, as follows:

I.

Deny each and every allegation of said counterclaim appearing on pages four and five of the answer; deny that on or about the 25th day of September, 1926, or at any other time, defendants or either of them made and/or entered into a contract with the Goodyear Redwood Lumber Company whereby Goodyear Redwood Lumber Company agreed to sell and/or deliver to defendants, or otherwise, and/or that defendants agreed to purchase 698 net tons, or any other quantity, of 40-pound railroad relaying steel rails and/or to pay for same at the price of $25.00 a ton, or any other sum; deny that Goodyear Redwood Lumber Company delivered 618 tons of rail, or any other quantity, only or otherwise; deny that defendant thereby, or otherwise overpaid plaintiff's assignor the sum of $2,000.00, or any other sum; deny that any rails delivered were junk rail, or that there was any contract calling for 40-pound railroad relaying rail, or anything else; deny that the value of any rail was and/or is $12.50 per ton, or any other sum, [56] and deny that the difference in value between any rail was and/or is the sum of $3,075.00, or any other sum; deny that by or for any reason defendants were damaged in the sum of $3,075.00, or any other sum.

II.

Further answering said counterclaim, allege that said counterclaim does not state facts sufficient to constitute a defense or counterclaim.

WHEREFORE, V. BERGES and GOODYEAR REDWOOD LUMBER COMPANY pray that defendants take nothing and that V. Berges and Goodyear Redwood Lumber Company have judgment against defendants and each of them for their costs of suit and for such other relief as may be proper.

ANSWER TO CROSS-COMPLAINT

V. BERGES and GOODYEAR REDWOOD LUMBER COMPANY, answering the cross-complaint herein, being part of and attached to the answer on file herein, deny and allege as follows:

I.

Specifically deny each and all of the allegations contained in paragraphs 3, 4, 5, 6, 7, 8, and 9 inclusive.

II.

Further answering said cross-complaint, allege that said cross-complaint does not state facts sufficient to constitute a defense or cross-complaint.

WHEREFORE, V. BERGES and GOODYEAR REDWOOD LUMBER COMPANY

pray that cross-complainants take nothing and that cross-defendants have judgment against cross-complainants and each of them for their costs of suit and for such other relief as may be proper.

ROBERT E. HATCH,
Attorney for V. Berges and Goodyear Redwood Lumber Company.

State of California,
City and County of San Francisco—ss.

V. BERGES, being first duly sworn, deposes and says:

That she is the plaintiff in the above-entitled action; that she has read the foregoing answer to counterclaim and answer to cross-complaint and knows the contents thereof and that the same is true of her own knowledge, except those matters which are therein stated on information or belief and that, as to such matters, she believes it to be true.

V. BERGES.

Subscribed and sworn to before me this 2nd day of April, 1929.
[Seal] DAISY CROTHERS WILSON,
Notary Public, in and for the City and County of San Francisco, State of California." [57]

"In the Superior Court of the State of California, in and for the City and County of San Francisco.

No. 204,668.
Dept. Extra Session 3.

V. BERGES,

Plaintiff,

vs.

N. ABRAHAM, L. SILBERMAN and SAN FRANCISCO IRON & METAL COMPANY, a corporation, individually and as co-partners doing business under the name of N. ABRAHAM MERCANTILE COMPANY, and SAN FRANCISCO IRON & METAL COMPANY, a corporation,

Defendants.

FINDINGS.

This action came regularly on for trial before the above-entitled Court, Hon. Walter E. Herzinger, Judge thereof, without a jury, on August 26, 1929, Robert E. Hatch appearing as attorney for plaintiff V. Berges, Messrs. Bianchi & Hyman by A. B. Bianchi appearing as attorneys for defendant Abraham, and Messrs. Brownstone & Goodman by Louis E. Goodman appearing as attorneys for defendants Silberman and San Francisco Iron & Metal Company, and the parties being personally pres-

ent in Court. Thereupon evidence on behalf of the respective parties hereto was duly given and received by said Court and the trial of said action was continued from day to day and, upon the evidence being closed, arguments and briefs by counsel were made and submitted to the Court and the Court, having duly considered the evidence and the law and [58] being fully advised in the premises, does now find the facts herein as follows, to-wit:

FACTS.

I.

That at all times herein concerned and particularly from July 1, 1926, to December 1, 1927, defendants N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, were joint adventurers and were co-partners doing business under the name of N. Abraham Mercantile Company; that at all times herein concerned, particularly from July 1, 1926, until the present time, San Francisco Iron & Metal Company was and now is a corporation duly organized and existing under and by virtue of the laws of the State of California.

II.

That the true names of First Doe to Tenth Doe inclusive, sued individually and as copart-

ners doing business under the name of N. Abraham Mercantile Company, were unknown to plaintiff up to the time of the trial in this case and they were therefore sued by such names which were fictitious names; that during said trial and before its date plaintiff duly requested and received from this Court leave to amend the complaint in this action by substituting in and amending said complaint to read "San Francisco Iron & Metal Company, a corporation" in the place and stead of "First Doe" and that plaintiff did duly so amend and substitute; that defendant San Francisco Iron & Metal Company did in open Court stipulate that such amendment and substitution be made and the parties hereto by and through their respective counsel above named did during said trial stipulate and agree that defendant did deny the allegation of the complaint as to said amendment and substitution.

III.

That at all times herein concerned, particularly from July 1, 1926, to the present time, Goodyear Redwood Lumber Company was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Maine and lawfully operating and transacting business in the State of California.

IV.

That within four years next preceding the commencement of this action defendants N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as copartners doing business under the name of N. Abraham Mercantile Company, became indebted to Goodyear Redwood Lumber Company in the State of California in the sum of Four Thousand Seven Hundred Nine and 61/100 ($4,709.61) Dollars upon a mutual, open and current book account as and for a balance due as of December 10, 1926, for steel rails sold by said Goodyear Redwood Lumber Company to said defendants.

IV-a.

That prior to the commencement of this action and for good and valuable consideration, defendant San Francisco Iron & Metal Company, a corporation, agreed to and did assume all of the obligations and liabilities of said N. Abraham Mercantile Company and of N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as copartners doing business under the name of N. Abraham Mercantile Company; [59] that prior to the commencement of this action, defendant San Francisco Iron &

Metal Company, a corporation, received all or practically all of the property and assets of the N. Abraham Mercantile Company and of N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as copartners doing business under the name of N. Abraham Mercantile Company, and in consideration thereof and other valuable considerations specially promised and agreed to apply said property and assets to the payment of the said indebtedness to the said Goodyear Redwood Lumber Company, but that said defendant San Francisco Iron & Metal Company has wholly failed to do so.

V.

That prior to the commencement of this action, said Goodyear Redwood Lumber Company sold, transferred and assigned to V. Berges all of its right, title and interest in and to the claim and matters hereinabove set forth and that plaintiff is still the owner and holder thereof.

VI.

That plaintiff has duly demanded of defendants said sum of money last mentioned but that, at all times herein concerned and up to the present time, defendants have refused to pay to plaintiff said sum; all to plaintiff's damage in the sum of Four Thousand Seven Hundred Nine

and 61/100 ($4,709.61) Dollars as of December 10, 1926, all of which is due, owing and unpaid from said defendants to said plaintiff.

VII.

That the matters alleged in defendant's answers contrary hereto are not true and particularly the Court finds the following to be untrue; that Goodyear Redwood Lumber Company delivered to defendants less quantity or quality of steel rails than was agreed and contracted by the parties to be delivered; that defendant or defendants overpaid Goodyear Redwood Lumber Company in anywise deficient or of less quality or value than agreed to be delivered; that defendant or defendants were damaged in any sum; and the Court specially finds that no evidence of any kind or character was offered or received in support of the cross-complaint or counter-claim or separate or special defenses of the defendants and further finds that said cross-complaint, counter-claim and separate and special defenses were at the time of trial abandoned by the defendants.

SECOND CAUSE OF ACTION.

I.

That each and every of the findings herein numbered I, II and III are adopted and made part of the findings of this Court as to the second cause of action.

II.

That the Court further finds, as and for paragraph IV, that within two years next preceding the commencement of this action, defendants N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as co-partners doing business under the name of N. Abraham Mercantile Company, became indebted to Goodyear Redwood Lumber Company in the State of California in the sum of Four Thousand Seven Hundred Nine and 61/100 ($4,709.61) Dollars, as of December 10, 1926, as and for the reasonable value of steel rails sold and delivered to said defendants by Goodyear Redwood Lumber Company.

III.

That each and every of the findings herein numbered IV-a, V, VI and VII are adopted and made part of the findings of this Court [60] as to the second cause of action.

THIRD CAUSE OF ACTION

I.

That each and every of the findings herein numbered I, II and III are adopted and made part of the findings of this Court as to the third cause of action.

II.

The Court further finds, as and for paragraph IV, that within two years next preceding the commencement of this action, defendants N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as co-partners doing business under the name of N. Abraham Mercantile Company, agreed to immediately pay Goodyear Redwood Lumber Company the sum of Four Thousand Seven Hundred Nine and 61/100 ($4,709.61) Dollars for and in consideration of the sale and delivery by Goodyear Redwood Lumber Company to said defendants of certain steel rails; that Goodyear Redwood Lumber Company did sell and deliver said steel rails to said defendants.

III.

That each and every of the findings herein numbered IV-a, V, VI and VII are adopted and made part of the findings of this Court as to the third cause of action.

FOURTH CAUSE OF ACTION.

I.

That each and every of the findings herein numbered I, II and III are adopted and made part of the findings of this Court as to the fourth cause of action.

II.

That the Court further finds, as and for paragraph IV, that after the dealings in the complaint named and before the commencement of this action, the said Goodyear Redwood Lumber Company came to a mutual accounting touching the several matters and things in the complaint mentioned; that on the said accounting, there was found due from defendants N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as co-partners doing business under the name of N. Abraham Mercantile Company, to said Goodyear Redwood Lumber Company, as a final balance upon said mutual dealings and matters between said defendants and Goodyear Redwood Lumber Company the sum of Four Thousand Seven Hundred Nine and 61/100 ($4,709.61) Dollars; and that the said stated account is just and true.

III.

That each and every of the findings herein numbered IV-a, V, VI and VII are adopted and made part of the findings of this Court as to the fourth cause of action. [61]

From the foregoing facts, the Court makes the following

CONCLUSIONS OF LAW.

I.

That plaintiff V. Berges is entitled to and it is hereby ordered that she have judgment against defendants N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as co-partners doing business under the name of N. Abraham Mercantile Company, for the sum of Four Thousand Seven Hundred Nine and 61/100 ($4,709.61) Dollars, with interest thereon at the rate of seven per cent per annum from December 10, 1926, until date of this judgment, together with her costs of action.

II.

That defendants are not entitled to any relief or to recover anything in this action on said counter-claim or cross-complaint.

Let judgment and decree be entered accordingly.

Done in Open Court this 8th day of October, 1929.

WALTER E. HERZINGER,
Judge of said Superior Court."

"In the Superior Court of the State of California, in and for the City and County of San Francisco.

No. 204,668.
Dept. Extra Session No. 3

V. BERGES,

Plaintiff,

vs.

N. ABRAHAM, L. SILBERMAN and SAN FRANCISCO IRON & METAL COMPANY, a corporation, individually and as copartners doing business under the name of N. ABRAHAM MERCANTILE COMPANY and SAN FRANCISCO IRON & METAL COMPANY, a corporation,

Defendants.

JUDGMENT.

This cause coming on regularly to be heard and after the evidence was introduced and argument had by counsel for the respective parties, the Court made and filed its findings of fact and conclusions of law. Pursuant thereto, IT IS HEREBY ORDERED, ADJUDGED AND DECREED: [62]

1. That plaintiff, V. Berges, do have and recover from the defendants, N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as

joint adventurers and as co-partners doing business under the name of N. Abraham Mercantile Company, the sum of Five Thousand Six Hundred Forty-three and 65/100 ($5,643.65) Dollars, together with her costs of action taxed at $112.40.

2. That defendants take nothing by reason of their counterclaim and cross-complaint.

"In the Superior Court of the State of California, in and for the City and County of San Francisco.

V. BERGES,

Plaintiff,

vs.

N. ABRAHAM,

Defendant.

State of California,
City and County of San Francisco—ss.

I, H. I. Mulcrevy, County Clerk of the City and County of San Francisco, State of California, and ex-officio Clerk of the Superior Court, do hereby certify the foregoing to be a true copy of the judgment entered in the above entitled cause, and recorded in Judgment Book 305 of said Court at page 67. And I further certify that the foregoing papers hereto annexed constitute the judgment roll in said cause.

WITNESS my hand and seal of said Superior Court this 11th day of November, A. D. 1929.

H. I. MULCREVY,
Clerk.
By J. D. Devlin,
Deputy Clerk."

By consent of both parties the rest of the judgment roll is not inserted herein, because it is deemed that the foregoing portions of the judgment roll sufficiently cover any matters in such judgment roll which are material to the issues in this case and useful in determining the same.

The plaintiff also offered in evidence by and through said Harold Emmal, Esq., in the aforesaid action a writ of attachment issued therein, dated February 13, 1929, to the Sheriff of the City and County of San Francisco for the sum of Forty-seven [63] Hundred Nine Dollars and Sixty-one Cents ($4709.61), with interest and costs, and directing the Sheriff to attach and safekeep all of the property of the defendants, which writ of attachment was entered as received by the Sheriff on February 13, 1929, and was endorsed and filed by the Clerk of said City and County of San Francisco on March 4, 1929, and which writ had attached thereto the following:

"Return of Garnishment.
Office of the Sheriff
of the City and County
of San Francisco.

By virtue of the annexed writ, I duly attached and levied upon, on the twenty-third day of February, A. D. 1929, at 9:45 o'clock A.M., all moneys, goods, credits, effects, debts, due or owing; or any other personal property in possession or under control of Bank of America of California, 108 Sutter Street, belonging to the defendants named in said writ, or to either of them, by delivering to and leaving with W. A. Sandris, Asst. Cashier, personally, in the City and County of San Francisco, a copy of said writ with a notice in writing that said property was attached and levied upon, and not to pay or transfer the same to any one by myself.

Statement demanded.

Answers as follows, to-wit:

ACCEPTED SERVICE BUT MADE NO STATEMENT.

W. J. FITZGERALD,
Sheriff.

By H. J. Sung,
Deputy Sheriff.

Released by order of Pltff's Att'y. Feb. 26, 1929."

"Return of Garnishment.
Office of the Sheriff
of the City and County
of San Francisco.

By virtue of the annexed writ, I duly attached and levied [64] upon, on the 13th day of February, A. D. 1929, at 3:00 o'clock P. M., all moneys, goods, credits, effects, debts, due or owing; or any other personal property in possession or under control of Anglo London and Paris National Bank belonging to the defendants named in said writ or to either of them, by delivering to and leaving with A. Armstrong, Ass't Cashier, personally, in the City and County of San Francisco, a copy of said writ with a notice in writing that such property was attached and levied upon, and not to pay or transfer the same to any one but myself.

Statement demanded.

Answer as follows, to-wit:

NO ANSWER.

W. J. FITZGERALD,
Sheriff.

By W. J. Carr,
Deputy Sheriff.

Released by order of Pltff's Att'y. Feb. 26, 1929.

Released, defd't having filed a bond 2/14/29 as to one defendant."

"Return of Garnishment.
Office of the Sheriff,
City and County of
San Francisco.

By virtue of the annexed writ of attachment I duly levied upon and took into my possession on the 13th day of February, A. D. 1929, certain personal property in the City and County of San Francisco as property of the therein named defendants, to-wit:

Part contents of store located at 1133 Market Street, consisting of gent's furnishing goods, stock in trade, keeper in charge.

W. J. FITZGERALD,
Sheriff.

By W. J. Carr,
Deputy Sheriff. [65]

Released by order of Pltff's Att'y, Feb. 26, 1929.

Released, Defd't having filed a bond as to one defd't."

"Return of Garnishment.
Office of the Sheriff,
City and County of
San Francisco.

By virtue of the annexed writ of attachment, I duly levied upon and took into my possession

on the 13th day of February, A. D. 1929, certain personal property in the City and County of San Francisco as property of the therein named defendants, to-wit:

Part contents of place of business, located at 2301 Stockton Street, consisting of iron rails, iron beams, two cranes, iron plates and office fixtures, stock in trade, keeper in charge.

Released by order of Pltff's Atty. Feb. 26, 1929.

W. J. FITZGERALD,
Sheriff.

By W. J. Carr,
Deputy Sheriff.

Released, defd't having filed a bond as to one defd't."

The defendant objected to the introduction of the foregoing documents "as being immaterial, irrelevant and *im*competent in this proceeding," The Court overruled the objection and the defendant excepted and the documents were received in evidence.

VIVIAN BERGES,

called for plaintiff, testified as follows:

I am that V. Berges, who was the plaintiff in the action of V. Berges vs. Abraham, the Silbermans and the San Francisco Iron & Metal Company. I

(Testimony of Vivian Berges.)

signed the assignment of judgment in that case from myself to G. Nelson. The assignment bears the signature of Robert E. Hatch, attorney for the plaintiff in that case. I was [66] one of the stenographers in Mr. Hatch's office when that suit was brought. I was acting only as an assignee for collection for the lumber company. The lumber company was the real party in interest. I did not get any money in satisfaction of that judgment myself, nor did I get any money in payment of the judgment. I presume that any money was paid to the lumber company for which I was the assignee for collection. I am not familiar about the facts of the case.

I do not recollect whether I have seen this assignment before. I don't believe I read it and I don't think I knew anything about the contests of it, but that is my signature to it.

LEWIS N. MITCHELL,

also called as a witness for the plaintiff, testified as follows:

Direct Examination

I am one of the partners in the firm of Hadsell, Sweet & Ingalls. I prepared the Assignment of Judgment. I had the document signed by V. Berges and Robert E. Hatch, the attorney for the plaintiff in that suit. Then the assignment was returned to me,

(Testimony of Lewis N. Mitchell.)

after it was signed by those parties at the date shown in the assignment. I was acting for G. Nelson in getting that assignment. At the same time, the stipulation mentioned in paragraph IV of plaintiff's complaint and the undertaking on release of attachment mentioned in paragraph III of the plaintiff's complaint were delivered to me by Attorney Robert E. Hatch. Mr. Goodman was attorney for the defendants San Francisco Iron & Metal Company and the Silbermans. The assignee in this assignment, G. Nelson, is an employee in the office of Hadsell, Sweet & Ingalls and is the G. Nelson who is the plaintiff in the suit here on trial. [67]

Cross-Examination.

MR. WISECARVER. Q. Mr. Mitchell, at the time that you prepared this assignment of judgment that is so entitled, were you acting solely for G. Nelson.

MR. HADSELL. If the Court please. I want to enter a formal objection to the question on the ground that it is immaterial, irrelevant and incompetent, because we claim that, having taken an assignment, the plaintiff is entitled to go ahead regardless of what happened in taking the assignment. I have no objection to taking the evidence, however, so that the Court will have all the evidence before it. I just want to reserve the point.

THE COURT. Objection overruled. May I see the assignment?

(Testimony of Lewis N. Mitchell.)

MR. HADSELL. May it be understood that that objection goes to all this line of questions. Mr. Wisecarver, dealing with the purpose of the assignment, and the rest of it, so far as the Fidelity & Casualty Company is concerned?

MR. WISECARVER. I don't know just how far you want to go with that.

MR. HADSELL. I don't want to make objection after objection if I can have that understanding.

MR. WISECARVER. All right, let us just have that understanding as to this witness.

MR. HADSELL. All right, and I will reserve my exception, if the Court please.

A. Do you mean, Mr. Wisecarver, was I acting for some person other than G. Nelson?

MR. WISECARVER. Q. Yes.

A. The firm of Hadsell, Sweet & Ingalls were attorneys for the Fidelity & Casualty Company of New York. In taking this [68] assignment and in purchasing this judgment from the plaintiff, V. Berges, I was acting for the Fidelity & Casualty Company of New York. The judgment, under those circumstances, was assigned to G. Nelson. G. Nelson, I might say, held the judgment. It was taken by her for the benefit of the Fidelity & Casualty Company, and the cash was paid—the amount that is shown there.

Q. G. Nelson is a stenographer in your office?

A. Yes.

(Testimony of Lewis N. Mitchell.)

Q. And the Fidelity & Casualty Company of New York had issued a release of attachment bond for N. Abraham in the same proceeding in which this assignment appears, had it not?

A. I believe there was a release of attachment bond issued by the Fidelity & Casualty Company, wherein N. Abraham was named as the principal. If I could be shown that bond I would recall more about it. There was such a bond. I don't recall the date of it now, or what was in the bond, exactly.

Q. I show you a document purporting to have been executed by the Fidelity & Casualty Company of New York, and ask you if that is the document to which you refer?

A. I believe this is the document.

Q. At the time you received the papers that you identify, the assignment of judgment and the stipulation and the undertaking on the release of attachment that you have mentioned, did you receive from Mr. Hatch, the attorney for V. Berges, this bond I have just shown you, executed by the Fidelity & Casualty Company of New York?

A. My recollection is that was handed to me with the other papers at the same time.

Q. What did you do with that bond of the Fidelity & Casualty Company of New York? [69]

A. I put it in my files with the other papers, or else I returned it to the Fidelity & Casualty Company of New York, one of the two.

(Testimony of Lewis N. Mitchell.)

Q. Is it not a fact you did return it to the Fidelity & Casualty Company of New York?

MR. HADSELL. I will stipulate that it was returned.

A. My recollection was just a little dim on that, but I think it was, but just the day or how soon afterwards it was I cannot say at this time.

MR. WISECARVER. Mr. Hadsell has so stipulated.

Q. You say you are the attorney for the Fidelity & Casualty Company of New York?

A. Yes, the firm is.

Q. And you are a member of the firm?

A. Yes.

Q. And the Fidelity & Casualty Company of New York is a surety company regularly engaged in the business of executing surety bonds of this character in the State of California, and was at that time?

A. Yes.

Q. That is of your own knowledge?

A. To the best of my knowledge it was and is.

MR. WISECARVER. I will ask at this time that the bond of the Fidelity & Casualty Company be entered as an exhibit in the case.

THE COURT. So ordered.

(The document was here marked "DEFENDANT'S EXHIBIT A").

MR. WISECARVER. Q. In procuring this assignment of judgment who was it that provided the funds for the purchase of that assignment. [70]

(Testimony of Lewis N. Mitchell.)

A. The Fidelity & Casualty Company of New York. The funds were delivered to me, as I recall it, and they were deposited to the account of Miss Nelson; the funds were delivered to her and they were put in her account, in the Mercantile Trust, or in the American Trust Company, as I recall it, and thereupon she issued her check in purchase of this judgment to the plaintiff. Her check was made out personally to V. Berges, and as I recall it V. Berges endorsed the check and the check was cashed.

Q. The ownership of the fund was in the Fidelity & Casualty Company, that is, she was holding it for them as trustee, and paid the judgment for them under that arrangement.

A. I don't know whether that calls for my conclusion or not, but these are the facts as I recollect them: The funds were delivered to me; I gave the funds to Miss Nelson, or else they were issued to her direct, I don't recall which. She made a deposit in her own account. Then she issued her check for the same identical amount payable to V. Berges, in the purchase of the judgment.

Q. And at that time you were acting for the Fidelity & Casualty Company of New York?

A. Yes.

Q. And as their attorney, they delivered these funds to you for the purpose of purchasing the judgment?

A. Yes, that is correct, for the purpose of purchasing an assignment of the judgment.

(Testimony of Lewis N. Mitchell.)

MR. HADSELL. I offer this assignment in evidence if the Court please.

MR. WISECARVER. To which we object as immaterial, irrelevant, incompetent.

THE COURT. Objection overruled.

MR. WISECARVER. Exception. [71]

The assignment was then received in evidence and reads as follows:

"In the Superior Court of the State of California, in and for the City and County of San Francisco.

No. 204,668.

Dept. Extra Session No. 3.

V. BERGES,

Plaintiff,

vs.

N. ABRAHAM, L. SILBERMAN and SAN FRANCISCO IRON & METAL COMPANY, a corporation, individually and as copartners doing business under the name of N. ABRAHAM MERCANTILE COMPANY, and SAN FRANCISCO IRON & METAL COMPANY, a corporation,

Defendants.

ASSIGNMENT OF JUDGMENT.

In consideration of the sum of Five Thousand Eight Hundred Fifty-seven and 96/100 Dollars

($5,857.96), gold coin of the United States to me paid, I do hereby sell, assign, and transfer to G. Nelson without recourse the judgment heretofore given, made and entered in the above entitled action on the 10th day of October, 1929, and entered in Judgment Book 305, at page 67, in the office of the clerk of the above entitled Court, in favor of the plaintiff V. Berges and against the defendant N. Abraham in the sum of Five Thousand Six Hundred Forty-three and 65/100 Dollars ($5,643.65) and One Hundred Twelve and 50/100 Dollars ($112.50) costs, together with interest on said total sum of Five Thousand Seven Hundred Fifty-six and 15/100 Dollars ($5,756.15) at the rate of 7% per annum, and against San Francisco Iron and Metal Company, a corporation, and L. Silberman in the sum of Five Thousand Six Hundred Forty-three and 65/100 Dollars ($5,643.65) and Sixty-nine and 90/100 Dollars [72] ($69.90) costs, together with interest thereon at the rate of 7% per annum or said total sum of Five Thousand Seven Hundred Thirteen and 55/100 Dollars ($5,713.55) for her full use and benefit; hereby authorizing her to collect and enforce payment thereof in my name or otherwise, or to prosecute the said cause on appeal in my name or otherwise but at her own costs and charges, and to take out execution in my name or otherwise, and to take in my name or otherwise, all lawful ways

and means for the affirmance of said judgment and the prosecution of said cause on appeal, and the undersigned does hereby covenant that she has not satisfied said judgment and that she will not collect or receive the proceeds of the said judgment, or any part thereof, or release, or discharge the said judgment, and will allow all lawful proceedings therein.

Dated, Feb. 21/30.

V. BERGES.

Approved.

ROBERT E. HATCH,
Attorney for Plaintiff, V. Berges.

[Endorsed]: Filed July 27, 1931. H. I. Mulcrevy, Clerk, by H. Brunner, Deputy Clerk".

GEORGIE NELSON,

called as a witness for the plaintiff, testified as follows:

I am the G. Nelson that is mentioned in the assignment of the judgment from V. Berges to G. Nelson. I received a check from the Fidelity & Casualty Company and took the check and in company with Mr. Mitchell went to the American Trust Company where I deposited it in my account. I draw another check payable to [73] V. Berges and handed it to Mr. Mitchell. That is the last I saw of that check. That was the transaction to which Mr. Mitchell was referring when he testified in this case. Since that

(Testimony of Georgie Nelson.)

time nobody has paid me the amount of that judgment, or any part of it. That judgment is still in my name. I have not assigned it to anybody, nor have I issued any satisfaction of that judgment to anybody. I understood I was holding this judgment for the Fidelity & Casualty Company of New York. I did not put any of my funds into the purchase of it.

Q. These funds that were supplied at the time by the Fidelity & Casualty Company of New York were for the purpose of purchasing for their account that judgment?

A. Yes, sir.

Q. And you so understood it?

A. I so understood it.

Q. And you now hold it in trust for them?

A. Yes.

Q. And you are now holding it, I say, in trust for them?

A. I am.

Thereupon the following occurred:

MR. HADSELL. We herewith deliver to the Clerk of the Court, for the benefit of the defendant, an assignment by G. Nelson of the unsecured debt evidenced by this proof of claim, for the purpose of turning over that claim and any rights under it to this defendant in the event, of course, that judgment is rendered here against this defendant and paid.

They should be entitled to that asset for whatever value there may be in it. So, for that limited purpose, we hand in this assignment to the Clerk for delivery under those conditions. [74].

MR. WISECARVER. We object to that as immaterial, irrelevant and incompetent in this proceeding at this time. It is premature.

MR. HADSELL. Well, whether it is premature, or not, I want to have it done so there will be no question of that kind raised.

MR. WISECARVER. This is not an equitable proceeding, it is an action at law.

THE COURT. That is the point I have in mind. If you have a right to recover here it is because of the law. That is one of the points of the defense, that you have not brought a suit in equity, but you have brought an action at law.

MR. HADSELL. My view is that this case started in the Superior Court of the State of California, in and for the City and County of San Francisco, where there is no distinction between law and equity, such as there is in the Federal Court. If in the State Court we could consider the equities of the matter, then by transferring it to this Court they cannot deprive us of that right.

THE COURT. In other words, you think that the conformity statute would apply here to the extent that defenses that are available in the State Courts of California would likewise be available here?

MR. HADSELL. Yes, or replication. Our position will be that of replication under the State statutes.

THE COURT. We will not argue that now. I will hear you on that at the end of the case. The assignment can be left with the Clerk. It is not necessary to rule on that objection at this time. The proffer has been made, and the Clerk will accept the proffer subject to such further determination as the Court may make in the case. [75]

ROBERT E. HATCH,

called for the plaintiff then testified:

Direct Examination.

I was the attorney for the plaintiff in the case of Berges v. Abraham, et al. I signed the stipulation on which appears in paragraph IV of plaintiff's complaint and procured the signature thereto of Mr. Goodman. The bond, which is mentioned in paragraph III of plaintiff's complaint, was delivered to me in connection with that case by one of the young men in Mr. Goodman's office. My recollection is that that bond was retained in my office during the pendency of the Superior Court action No. 204,668, and, at least, until such time as the judgment was entered in favor of the plaintiff. I don't think that bond was ever in the possession of the Sheriff. I examined the bond and felt that before I ordered the attach-

(Testimony of Robert E. Hatch.)

ment released I should have a stipulation in the form of this one which I prepared. After I got the bond, I gave the release of attachment. The release was ordered by me as the result of having obtained the bond and not otherwise. The signature to the assignment of the judgment in the case of Berges v. Abraham et al. was affixed in my presence by Miss Berges, at my request. Mr. Mitchell presented that document and had it signed in my office and took it back with him.

Q. I will ask you whether or not, as long as Miss Berges remained the legal holder of the judgment, she ever, as far as you know, gave any satisfaction of judgment as distinguished from an assignment of judgment?

A. I am positive that she did not.

MR. WISECARVER. Q. That is only in so far as you know?

A. Surely. [76]

Cross-Examination.

At the time of the execution of the assignment, I turned the assignment and bond over to Mr. Mitchell. I considered myself finished with the case and gave Mr. Mitchell whatever papers out of my file that he wanted and I think that it included and that he took The Century Indemnity Company's bond.

Q. Refreshing your recollection and showing you this bond of the Fidelity & Casualty Company, I

(Testimony of Robert E. Hatch.)

ask you if you gave him that bond at that time?

A. I will state my recollection on that to the best of my ability, and that is, that both of these bonds and the stipulations connected with the bonds were maintained in my office and delivered to Mr. Mitchell; I am not certain as to that, and I am somewhat doubtful, in view of your statement, Mr. Wisecarver, about two days ago, that one of these bonds, as I understood you, had been filed in the Sheriff's office. My recollection is that both of the bonds were maintained in my office. If the Sheriff's office records indicate to the contrary I would not dispute them.

Q. The bond of the Fidelity & Casualty Company you have seen * * * it was in your office?

A. Yes. It has my handwriting on the back, "Burges vs. Abraham."

Q. And that was given to you as the attorney for the plaintiff in that action?

A. Yes.

Q. And did you release an attachment against N. Abraham on account of that bond being delivered to you? [77]

A. I think I did; in other words, we had property of both Abraham and the San Francisco Iron & Metal Company under attachment; two separate bonds were issued, two separate stipulations taken, and so far as I recall it all of the attachments released.

Q. Is it not a fact that the bond of The Century Indemnity Company was filed with the Sheriff?

(Testimony of Robert E. Hatch.)

A. I don't know. There is no indication on here that it was.

Q. Your answer is that you don't recollect about that?

A. I do not. Mr. Hadsell can tell you where he got the bond. I don't know. If it was in my files he was given the privilege of taking it. Whether he got it from my files, or got it from the Sheriff, I don't recall.

Q. With reference to that assignment, so far as you were concerned you were disposing of the judgment at that time, were you not?

A. I can only give you a legal analysis, I guess, of the assignment. I sold, on behalf of the plaintiff, all of her right, title and interest in and to the subject matter of that action. Having so done, I do not recall that we figured that we had anything left. So I suppose that, within your question, that would be a disposal.

Q. Did you receive a full payment of the amount of that judgment in cash?

A. I don't recall the amount of the judgment, but we received the sum that is recited in the assignment, $5,827.96.

Q. There was no purchase of that for a less sum than the actual amount shown on the face of the assignment?

A. I cannot answer that directly, excepting that the amount of the judgment, I believe, was either dif-

(Testimony of Robert E. Hatch.)

ferent as to several defendants, or the amount of costs * * * no, I think it [78] was this, the cost bills filed were different as against the different defendants; in other words, we had a keeper in charge on the Abraham attachment that the attorneys for the Silbermans and the San Francisco Iron & Metal Company claimed that they did not owe, that is, that it was not a proper charge against them. So I think we figured that there was a different amount due from the Silbermans and the San Francisco Iron & Metal Company than on the Abraham interest.

Q. What I am asking you is this: Do you recollect whether or not you received the full amount of cash that is stated as the consideration for that assignment?

A. My recollection is that we received the sum of $5,827.96, recited in the assignment of judgment that has been referred to. The Court has just handed me the judgment roll in the Superior Court action. It shows that the amount of the judgment was $5,634.65 and costs $112.40. I believe that Mr. Goodman claimed that we should not hold him for the full amount of the costs because of the fact, as I say, that part of these were keeper's fees as to the defendant Abraham. I do not recall at this time how the amount that was paid to us for the assignment was computed.

THE COURT. Q. The judgment, however, was against all of the defendants in the same amount?

(Testimony of Robert E. Hatch.)

A. That is correct.

Q. That changes your recollection, does it not?

A. No, my recollection is that the judgment was entered in that way, but I conceded to Mr. Goodman that we should not hold him for the other man's costs.

MR. WISECARVER. Q. You did not consider that there was any remainder of that judgment remaining in the plaintiff after [79] that assignment?

A. No. I had forgotten all about the case after we received our money.

Q. You received the full amount you considered the plaintiff was due?

A. Yes.

Thereupon, as DEFENDANT'S EXHIBIT A, the defendant introduced the following undertaking on release of attachment:

"Premium charged for this bond is the sum of $60.00 per annum.

Bond No. 1,225,008.

In the Superior Court of the City and County of San Francisco, State of California.

N. ABRAHAM, et al.,

Defendant,

vs.

V. BERGES,

Plaintiff.

UNDERTAKING ON RELEASE OF ATTACHMENT.

WHEREAS, the above named plaintiff commenced an action in the Superior Court of the City and County of San Francisco, State of California, against the above named defendants claiming that there was due to said plaintiff from said defendants the sum of Forty Seven Hundred Naught Nine and 61/100 ($4,709.61) Dollars or thereabouts, and thereupon an attachment issued against the property of said defendants as security for the satisfaction of any judgment that might be recovered therein; and certain property and effects of the said defendants have been attached and seized by the Sheriff of the said San Francisco County, under and by virtue of the said writ; [80]

AND WHEREAS, the said defendant N. Abraham is desirous of having said property released from said attachment;

NOW, THEREFORE, the undersigned, The Fidelity and Casualty Company of New York, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and duly licensed to transact a general surety business in the State of California, in consideration of the premises, and also in consideration of the release from said attachment, of the property attached, as above mentioned, does hereby undertake in the sum of Six

Thousand and 00/100 ($6,000.00) Dollars, and promise that in case the plaintiff recover judgment in the action, defendants will, on demand, redeliver the attached property so released to the proper officer, to be applied to the payment of the judgment, or in default thereof, that the defendants will, on demand, pay to plaintiff the amount of whatever judgment may be recovered in said action, together with the interests and costs; the same to be paid in United States Gold Coin, if so required by the terms of the judgment.

IN TESTIMONY WHEREOF, the said surety has caused these presents to be executed and its official seal attached by its duly authorized Attorney at San Francisco, California, on the 21st day of February, A. D. 1929.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,

[Seal] By W. L. Dawson, Attorney.

(Undertaking on Attachment, California.)

Bond 1236,250

(2301146)"

Thereupon the following proceedings took place:

[81]

MR. WISECARVER. Will your Honor just grant me a moment? I don't know that it will be

necessary for us to introduce any evidence at all, your Honor, because I think the matter has been pretty well covered. Mr. Hadsell has just stated that he will stipulate that the bond of the Fidelity & Casualty Company that has heretofore been identified as Defendant's Exhibit A was issued by the Fidelity & Casualty Company of New York for N. Abraham in that same proceeding of V. Berges v. N. Abraham, et al., No. 204668, in the Superior Court of the State of California in and for the City and County of San Francisco, and was for the release of certain property of N. Abraham attached in that proceeding, and that it was delivered to plaintiff's attorney and was by him returned to Mr. Hadsell's office at the time of the execution of the assignment which has been referred to in this proceeding.

MR. HADSELL. And that this bond related solely to the release of the attachment as against N. Abraham.

MR. WISECARVER. That this bond was issued. It is a matter of legal interpretation as to what it relates.

MR. HADSELL. No. That was the purpose of the bond, to release the attachment against N. Abraham only. I am willing to stipulate to that, but no further.

MR. WISECARVER. That this bond was issued for N. Abraham to release an attachment in that proceeding.

MR. HADSELL. To release an attachment against N. Abraham. That is as far as I will go.

Not as against the other defendant. That is as far as I am willing to stipulate.

MR. WISECARVER. You will stipulate that an attachment was issued, and that this bond was issued in that proceeding?

MR. HADSELL. To release the attachment against his property only. [82]

MR. WISECARVER. And that such attachment was released in that proceeding on account of this bond having been issued.

MR. HADSELL. Yes, that his property was released on account of this bond. That is what I am stipulating to, not as to the others.

MR. WISECARVER. And you will stipulate that the assignment that was taken in the name of G. Nelson was taken at the direction of your office as attorneys for the Fidelity & Casualty Company on account of their liability under that bond that is, that they paid the amount in order to get that bond back, and to present a cause of action on that assignment as evidenced by this suit.

MR. HADSELL. Yes, that is correct.

MR. WISECARVER. And also that the Fidelity & Casualty Company is the real party in interest in this suit, the name G. Nelson being used merely as an assignee for purposes of collection.

MR. HADSELL. That is correct.

MR. WISECARVER. I think that is all, your Honor."

The foregoing having been incorporated into the record, plaintiff rested.

MR. WISECARVER. At this time we wish to make a motion for a nonsuit upon the ground that there has been no proof showing that the plaintiff is entitled to recover any amount from this defendant in this action, that there is no competent evidence before the Court showing that the plaintiff is entitled to a judgment in any amount against the defendant.

THE COURT. Motion denied; exception noted.

[83]

LOU HARRY SILBERMAN,

called for the defendant, then testified:

Direct Examination.

By Mr. WISECARVER:

I am in the salvage business. During the year 1926 I was vice president of the San Francisco Iron & Metal Company, and at that time met N. Abrahams. I had business dealings with him approximately some time in November, 1926, I don't know the exact date.

Q. What was the character of the business relationship you had with him at that time?

THE COURT. With whom?

MR. WISECARVER. N. Abraham.

MR. HADSELL. I object to the question, if Your Honor please, as entirely outside of the issues

(Testimony of Lou Harry Silberman.)

in this case, as immaterial, irrelevant and incompetent.

THE COURT. Overruled, and an exception.

MR. SILBERMAN. Well, I entered into a partnership with him on behalf of the San Francisco Iron & Metal Company. I was vice president of that company.

MR. HADSELL. Just a moment. May it be understood that my objection goes to all this line of questions to this witness.

THE COURT. Yes, and that the objection is overruled and an exception is entered.

MR. SILBERMAN. I do not remember whether the partnership was in writing or not. I could not swear positively but I do not think it was.

MR. HADSELL. If that was in writing we would like to have it before he testifies about it.

THE COURT. Was it in writing?

A. I do not think it was. It has been a long time, I am [84] not positive of it.

Q. If it was in writing, where is the writing?

A. I am sure I don't know.

THE COURT. Objection overruled; an exception.

MR. SILBERMAN. The partnership was composed of the assets of N. Abraham Mercantile Company and the moneys which I put in for the San Francisco Iron & Metal Company.

Q. Approximately how much did you put in for the San Francisco Iron & Metal Company?

(Testimony of Lou Harry Silberman.)

MR. HADSELL. The same objection, if your Honor please, immaterial, irrelevant and incompetent.

THE COURT. Objection overruled; an exception.

MR. SILBERMAN. The San Francisco Iron & Metal Company put in from $60,000.00 to $70,000.00. The assets of Mr. Abraham were approximately $50,000.00.

MR. WISECARVER. Q. Among other assets of the N. Abraham Mercantile Company that were contributed by Mr. Abraham was there included property that formed the subject-matter of the suit known as Berges v. N. Abraham and others, that is, for the steel rails that were sold to the Abraham Mercantile Company?

MR. HADSELL. I object to that on the same ground.

THE COURT. Overruled; an exception.

MR. SILBERMAN. The steel rails were part of the assets of N. Abraham Company and those assets were included as assets of the partnership. N. Abraham Mercantile Company was a trade name of N. Abraham.

Q. Were there any liabilities of N. Abraham that were assumed on behalf of the San Francisco Iron & Metal Company in forming that partnership?

MR. HADSELL. The same objection, if your Honor please. [85]

(Testimony of Lou Harry Silberman.)

THE COURT. The same ruling; an exception.

A. There were no liabilities.

MR. WISECARVER. When did you dissolve the partnership?

A. In November 1927.

Q. At the time of the dissolution of the partnership did you or did the San Francisco Iron & Metal Company assume to pay the debts of the partnership?

MR. HADSELL. The same objection, if your Honor please, immaterial, irrelevant and incompetent in this case, by virtue of the judgment in Berges v. Abraham.

THE COURT. You claim all of these transactions between these people were not in writing?

MR. WISECARVER. I have not been able to find any writings.

THE COURT. Overruled; an exception.

MR. SILBERMAN. The partnership assumed all of the indebtedness when it was merged with the corporation. It did not assume to pay any of the antecedent personal debts of N. Abraham nor did the San Francisco Iron & Metal Company assume to pay any of those debts.

Cross-Examination.

By MR. HADSELL:

MR. HADSELL. I understand my objection has run to this whole line of testimony, if your Honor please.

(Testimony of Lou Harry Silberman.)

THE COURT. Yes.

MR. SILBERMAN. The partnership consisted of N. Abraham and myself acting for the San Francisco Iron & Metal Company. As I understood it the San Francisco Iron & Metal Company was one of the partners in this arrangement, and at the time of the formation of this partnership the N. Abraham Mercantile Company then had on hand the steel rails that had been bought from the Goodyear Redwood [86] Lumber Company. At that time N. Abraham, doing business under the name of N. Abraham Mercantile Company, had those steel rails on hand. They were on hand when I came back from the East. We had not made any arrangements as to a partnership. I had been dealing with N. Abraham before this but I had no interest in the N. Abraham Mercantile Company. The partnership was formed in November of 1926 and I had been East just before that. When I came back I got into a discussion with N. Abraham and the steel rails were on hand at that time. I did not know where they came from, but I learned where they came from. He told me where they had come from. I went over whatever assets he had and I found those rails were among the assets. Also among the assets were a lot of army goods, tents, cots, mattresses, and these were taken over.

He had on hand some uncollected accounts and I went over those with him and those were taken over too, and subsequently I think the partnership col-

(Testimony of Lou Harry Silberman.)

lected some of those unpaid accounts. The San Francisco Iron & Metal Company had certain assets that went into the partnership. The San Francisco Iron & Metal Company put into this partnership $60,000.00 or $70,000.00 in cash.

According to the accounts of N. Abraham Company he owed no debts. That is what he said at that time. We took over all the assets of N. Abraham and that included the book accounts. I really don't know when I first heard of the Goodyear Redwood Lumber Company claim. I remember that we were sued on it. I don't know whether I testified as a witness in that case. I know that I had a deposition taken. I don't remember going to court and testifying.

The San Francisco Iron & Metal Company participated in no profits of this arrangement. There were no profits. It did participate in paying liabilities of the partnership. Outside of [87] the Goodyear Redwood Lumber Company, the San Francisco Iron & Metal Company paid various liabilities of the partnership; the amount I could not say. I can't say now whether their loss was $60,000.00 or $70,000.00 in all or that $60,000.00 or $70,000.00 was paid before they took care of the loss of the partnership. The money which the San Francisco Iron & Metal Company put up was put up at different times, and the business was operated at a loss, requiring that they put up more money to take care of

(Testimony of Lou Harry Silberman.)

the bills. Finally, the San Francisco Iron & Metal Company went into bankruptcy. I do not think the bankruptcy was due to its participation in this joint venture. At least, not entirely. I don't know whether it had anything to do with this venture at all.

There were two Silbermans, H. Silberman, Sr., and H. Silberman, Jr.; H. Silverman, Sr. was not concerned in the matter. I think the suit was brought against H. Silberman, Jr. who worked for N. Abraham Company. He did not have any investment in this venture, but was a sort of manager for N. Abraham.

I lived in Los Angeles for a while in 1931; during the whole of 1931. My father and Thomas Nesbitt were the officers of the San Francisco Iron & Metal Company. I really don't know what became of the books of that company. I think the Receiver in Bankruptcy took them over. I think the partnership kept books but I was never able to get them. Mr. Abraham had a bookkeeper and an auditor that had charge of the books; I don't know their names and I don't know where they are or what has become of them.

I saw some of the books but I never saw them all because the auditor lived in Oakland; she was a lady; and she did not work at the Abraham Company at all times but she kept the books in Oakland most of the time. I think that is where she told me that she kept them. The principal place of business of the

(Testimony of Lou Harry Silberman.)

partnership [88] was 599 Brannan Street, San Francisco.

Before I went into this arrangement I had known Mr. Abraham for several years. He was engaged in the army goods business. I did not know anything about his business before going into it with him. My brother went to work for him, that is how I got interested in it for the San Francisco Iron & Metal Company. I knew Mr. Abraham was in this business for five or six years here in San Francisco and it was a considerable business. As to the investigation I made before I went into this arrangement with him, I went over what was supposed to be his books and went over his stock and that is the only investigation I made. As to what books I did go over, they were supposed to be the books of N. Abraham Mercantile Company. I do not remember what books they were but I think I went over all of them. He had some loose bills there but he was discounting the bills.

Abraham told me that the steel rails belonged to N. Abraham Mercantile Company.

I saw the books that were opened on behalf of this partnership but I did not have anything to do with directing the opening of these books; that was left to Abraham and my brother; that is about it. As to whether my brother continued to participate in this after the partnership deal was formed, he was there all the time. I think he was there five or six

(Testimony of Lou Harry Silberman.)

months before the partnership deal was formed. He was buying and selling merchandise. I think he had access to the books of the Abraham Mercantile Company. He told me about the claim of the Goodyear Redwood Lumber Company after the claim was made; he just told me there was a claim of the Goodyear Redwood Lumber Company. As to what I did about it with Abraham, well, I don't remember, I really think that Abraham said he would take care of it, but I really don't know, it [89] is quite a while ago. I refreshed myself yesterday; I read over the deposition that was taken to refresh my memory; it is quite a while ago this happened, and I have been through a lot of things since, and this matter has not bothered me much. I have been much worried about other things.

I can't give you the exact date of this arrangement with Abraham, it was some time in November 1926. At that time I went over the books and papers, and as to finding current bills on hand I did find some small bills yes. I really don't know whether those small bills were paid by the partnership or not. I think Mr. Abraham took care of those personal bills himself. I really would not say but I know they were taken care of.

I talked this deal over with my brother Harry before I went into it, but he never told me that he was engaged in purchasing or had purchased these steel rails in Mendocino County from the Goodyear

(Testimony of Lou Harry Silberman.)

Redwood Lumber Company, nor that he was having them shipped down, and as to whether he mentioned Mendocino County to me at all I don't think he did, it has been so long ago I would not say he did or did not, but I don't remember that he did. In fact, when I went East there were no rails, and when I came back there were rails. Before I went East I had gone down to N. Abraham & Company and had looked it over. I was very much pleased that Mr. Abraham had taken my brother in and was giving him a position. I had done business with Abraham but we did not have anything definite about going into a partnership agreement. I think I was in the East from September until November. As to whether it was part of my brother's duties to buy such things as steel rails and merchandise that Abraham was buying, I really don't know what he was doing before the partnership; all I knew he was down there at his place. I know that after I went into [90] the partnership his duties were buying and selling, and I don't know what his job was before that. He had been with N. Abraham four or five months, or maybe longer. Yes, I had been down there many times but it was not my business to talk to Harry about somebody else's affairs. The only thing I was interested in, I was much pleased that Abraham had given him a job. I have no knowledge of ever seeing any correspondence between Goodyear Redwood Lumber Company and Abraham or Harry Silberman, and I

(Testimony of Lou Harry Silberman.)

do not know of ever having any correspondence myself with the Goodyear Redwood Lumber Company about this claim.

Redirect Examination.

By Mr. WISECARVER:

MR. WISECARVER: Q. Mr. Silberman, a question was asked you by counsel, I believe it was in this form, aside from this obligation to the Goodyear Redwood Lumber Company was there any obligation that you paid for the partnership, and I will ask you if you paid those obligations for that partnership, or if you have paid this Goodyear obligation at all.

A. No, I don't think I did.

Q. If I understand your testimony correctly a few minutes ago you said in the dissolution of your partnership that the San Francisco Iron & Metal Company agreed to pay the obligation of the partnership, is that correct?

A. I did.

Q. Did you agree to pay any of the antecedent debts of Abraham prior to the formation of the partnership of November 1, 1926?

MR. HADSELL: I again object on the ground it calls for the conclusion of the witness.

THE COURT: Overruled; an exception. [91]

A. No, we did not assume any obligations that were prior.

(Testimony of Lou Harry Silberman.)

MR. WISECARVER: I think that is all.

MR. HADSELL: That is all.

MR. WISECARVER: That is satisfactory except of course, I make objection to the introduction of any of the judgment roll in this case except the judgment not pleaded.

THE COURT: You have already made that objection.

MR. WISECARVER: I do not want it to be construed that we have by this stipulation waived the objection. I wish also at this time to make a motion for judgment and findings.

MR. HADSELL: We do the same on behalf of the plaintiff, for the full amount, and request findings.

Thereafter, the case was orally argued before the court and was submitted upon written briefs. Thereafter and on June 1, 1934, and outside the presence of the parties, the Court made and entered its order granting judgment to the plaintiff with findings to be submitted. Thereafter proposed findings of fact and conclusions of law were served and lodged with the Court by plaintiff, and within the time allowed by law the defendant served and lodged its proposed special findings of fact and conclusions of law in lieu of those proposed by the plaintiff.

Thereafter and on June 16, 1934 the Court, with-

out the presence of the parties, signed the proposed special findings of fact and conclusions of law of the plaintiff and filed same on said date as the findings and conclusions of the Court, and judgment was entered on said June 16, 1934.

That all of the material evidence for determination of this cause has been set forth herein, as well as all proceedings on the trial thereof. That prior to the trial the respective par- [92] ties, by stipulation in writing as provided by law, had duly waived trial by jury.

That this bill of exceptions has been prepared and has been duly settled and allowed and engrossed within the time prescribed by law.

WHEREFORE, the foregoing is hereby settled and allowed as the bill of exceptions in the above entitled action.

Dated: Sept. 4th, 1934.

FRANK H. KERRIGAN,
United State District Judge.

[Endorsed]: Approved. HADSELL, SWEET, INGALLS & LAMB, by D. HADSELL.

[Endorsed]: Filed Sept. 4, 1934. [93]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable Frank H. Kerrigan, Judge of the United States District Court:

The above named defendant Century Indemnity

Company, conceiving itself aggrieved by the judgment made and entered on the 16th day of June, 1934, in the above entitled cause, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors which is filed herewith, and it prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United State Circuit Court of Appeals for the Ninth Circuit, and that a citation may be issued under the rules of such court in such case made and provided.

And your petitioner further prays that all further proceedings be suspended, stayed and superseded until the determination of said appeal by said United States Circuit Court of Appeals, and that the proper order relating to and fixing the [94] amount of security as supersedeas and for costs be made.

DATED: San Francisco, California, August 13th, 1934.

CENTURY INDEMNITY COMPANY,
Defendant.

JEWELL ALEXANDER
WM. C. BACON
R. P. WISECARVER
REDMAN, ALEXANDER & BACON
Attorneys for Defendant.

Receipt of copy of the within petition for appeal admitted this 13th day of August, 1934.

D. HADSELL
JOE G. SWEET
EVERETT A. INGALLS
R. F. LAMB
HADSELL, SWEET, INGALLS & LAMB

Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 13, 1934. [95]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now the defendant, The Century Indemnity Company, a corporation, by and through its attorneys, and in support of its petition for appeal says that in the record, proceedings, findings, opinion and in the final decree and judgment in this cause entered on June 16, 1934, manifest and material error has intervened to the prejudice of this defendant and appellant, to-wit:

1. That the United States District Court, for the Northern District of California, erred in denying the motion of this defendant and appellant for a non-suit.

2. That said court erred in failing and refusing to find that the plaintiff and defendant were not co-sureties.

3. That said court erred in failing and refusing to find that the plaintiff was not entitled to contribution from the defendant.

4. That said court erred in failing and refusing to find that plaintiff was not entitled to reimbursement from [96] defendant.

5. That said court erred in failing and refusing to find that the plaintiff is entitled under the pleadings to recover only by way of contribution or reimbursement and no more.

6. That said court erred in failing and refusing to find that plaintiff was not entitled to recover as an assignee of the judgment creditor.

7. That said court erred in admitting into the record as evidence, over the objection of this defendant, the findings of fact and particularly Finding "IVa" of said findings of fact in the judgment roll in the case of Berges vs. Abraham, et al.

8. That said court erred in failing and refusing to find that finding IVa in the findings of fact in the case of Berges vs. Abraham, et al was not res adjudicata as between the defendants in said action and is not res adjudicata between the parties to the present action.

9. That the said court erred in failing and refusing to find that the Fidelity and Casualty Company of New York is the real party plaintiff and that plaintiff is entitled to recover in this connection only the amount which the Fidelity and Casualty

Company of New York is entitled to recover by way of contribution or reimbursement.

10. That the said court erred in failing and refusing to find in accordance with the special findings and conclusions of law submitted by this defendant.

11. That the said court erred in failing and refusing to find that the payment for the judgment in the case of Berges vs. Abraham, et al. made by plaintiff G. Nelson was pur- [97] suant to and in fulfillment of the obligation of the Fidelity and Casualty Company of New York to pay said judgment under its bond and undertaking for release of attachment issued for N. Abraham, a judgment debtor in said action.

12. That the said court erred in failing and refusing to find that plaintiff is entitled to recover under her assignment of the judgment in Berges vs. Abraham, et al. only the amount which N. Abraham is entitled to recover against his joint debtors only, and was not entitled to recover against defendant, who is the surety of one of the other joint debtors under a release of attachment bond issued by it for one of those joint debtors.

13. That the said court erred in failing and refusing to find that The Century Indemnity Company and the Fidelity and Casualty Company of New York were not sureties of the same principal nor for the same obligation and that neither L. Silberman, San Francisco Iron & Metal Company nor The Century Indemnity Company were a principal or

principals under the bond and undertaking of Fidelity and Casualty Company of New York given to release an attachment against N. Abraham in the case of Berges vs. Abraham, et al.

14. That the said court erred in failing and refusing to find that the debt which formed the subject matter of the judgment in the action of Berges vs. Abraham, et al. was incurred by N. Abraham personally prior to his partnership with L. Silberman and San Francisco Iron & Metal Company, a corporation, that is prior to November 1, 1926, and that said partnership was dissolved on December 1, 1927, and that at the time of said dissolution it was not agreed that the San Francisco Iron & Metal Company would pay any of the antecedent [98] personal debts of N. Abraham contracted prior to November, 1, 1926, including the debt sued on herein, and that it is not true that the said San Francisco Iron & Metal Company agreed to save harmless the said N. Abraham of and from his obligation to pay said antecedent debt, including the debt sued on herein, and that finding IVa of the findings of fact in said action of Berges vs. Abraham, et al., to the effect that the said San Francisco Iron & Metal Company agreed to pay the said debt, which formed the subject matter of said action, was not an issue between the plaintiff and defendants in said action, and concerned only the defendants in said action, and the judgment in said action is not in accord with said finding, but is contrary to said finding, and said

finding is not admissible as evidence in this case.

15. That the said court erred in failing and refusing to find and to enter judgment accordingly that the plaintiff is not entitled either to contribution or reimbursement from the defendant, and that defendant is entitled to judgment against plaintiff for its costs.

16. That the said court erred in failing and refusing to find that this defendant was released of all liability under its release of attachment bond issued by L. Silberman and San Francisco Iron & Metal Company in the case of Berges vs. Abraham, et al., when said judgment was paid by plaintiff acting for and in behalf of Fideltiy and Casualty Company of New York, a surety of one of the joint debtors in said judgment.

17. That the said court erred in drawing from its special findings the following conclusion of Law:

> "That judgment should be entered in favor of the plaintiff and against the defendant in the sum of $6,000.00, together with interest thereon at the [99] legal rate of seven per cent per annum from the date of the commencement of this action, to-wit, September 24, 1931, together with plaintiff's costs of suit incurred herein."

18. That the said court erred in drawing from its special findings the following conclusion of law:

> "That upon the satisfaction of said judgment the clerk of this court should deliver to the

defendant the assignment by plaintiff to defendant of claim of plaintiff against the San Francisco Iron & Metal Company, a corporation, in bankruptcy."

19. That the judgment is contrary to law in this, that it adjudges in effect that the plaintiff can recover as and for an assignment of the judgment, whereas her sole right of recovery is for contribution or reimbursement and not as assignee of the judgment.

20. That the said court erred in failing and refusing to find that there is only a ratable contribution in equal proportions between the joint judgment debtors in the judgment in the case of Berges vs. Abraham, et al., and that the parties hereto cannot have a higher rate of contribution.

21. That the said court erred in finding that the San Francisco Iron & Metal Company agreed to pay the debt which formed the subject matter of the judgment sued on, in that there is no evidence to support said finding and it is contrary to the evidence.

22. That the judgment is contrary to law in that it is not justified by any evidence nor is it supported by findings of fact.

23. That the judgment is contrary to law in that it is contrary to the evidence. [100]

24. That the said court erred in failing and refusing to find that the judgment in the case of

Berges vs. Abraham, et al. was not in accord with and was contrary to finding number IVa in the case of Berges vs. Abraham, et al.

25. That the said court erred in ordering, rendering and in entering final judgment herein on June 16, 1934.

26. That the said court erred generally in refusing to order judgment in favor of this defendant and against plaintiff.

27. That the said court erred in ordering judgment for plaintiff for any sum at all.

28. That the said court erred in refusing to order judgment for the defendant upon the evidence in the cause.

WHEREFORE, said defendant prays that findings, decree and judgment be reversed and that an order be entered reversing the decree and judgment of the lower court in said cause and that said court be directed to render and enter a judgment and decree in favor of said defendant.

JEWEL ALEXANDER
WM. C. BACON
REDMAN, ALEXANDER & BACON
R. P. WISECARVER
Attorneys for Defendant
The CENTURY INDEMNITY COMPANY.

[Endorsed]: Service of the within Assignment

of Errors admitted this 13th day of August, 1934.

HADSELL, SWEET, INGALLS & LAMB

Attorney for Plaintiff

[Endorsed]: Filed Aug. 13, 1934. [101]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Upon motion of the attorneys for the above-named defendant and petitioner for appeal, and upon filing the petition of said defendant for appeal;

IT IS ORDERED that an appeal be and it is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment entered herein on the 16th day of June, 1934, in favor of plaintiff and against said defendant in the sum of $6,000.00, with interests at 7% per annum from September 24, 1931, and costs, and that the amount of the bond as required by law on said appeal be and the same is hereby fixed at the sum of $10,000.00, and said bond shall be conditioned that appellant will prosecute its said appeal to effect, and satisfy the judgment against it and answer all damages and costs if it fail to make its appeal good, and said bond shall act as a supersedeas and cost bond, and execution shall be stayed pending the outcome of said appeal.

DATED: August 13th, 1934.

FRANK H. KERRIGAN,
United States District Judge.

Amount of bond at $10,000.00 O. K. D. HADSELL.

[Endorsed]: Service of the within Order allowing appeal admitted this 13th day of_____ 192____

HADSELL, SWEET, INGALLS & LAMB,
Attorney__ for plaintiff.

[Endorsed]: Filed Aug. 13, 1934. [102]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, The Century Indemnity Company, a corporation, as principal, and Continental Casualty Company, a corporation organized and existing under and by virtue of the laws of the State of Indiana, and duly authorized to transact business and issue surety bonds in the State of California, as surety, are held and firmly bound unto G. Nelson in the sum of ten thousand dollars ($10,000.00), to be paid to the said G. Nelson, her heirs, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

SEALED with our seal and dated this 13th day of August, 1934.

WHEREAS, lately at a District Court of the United States for the Southern Division of the Northern District of California, in a suit pending

in said court between G. Nelson, plaintiff, and Century Indemnity Company, a corporation, defendant, a judgment was rendered against said defendant on the 16th day of June 1934, for the sum of $6000.00, together with interest thereon in the amount of 7% per annum from September 24, 1931, and costs; and [103]

WHEREAS, the said defendant The Century Indemnity Company, having obtained from said court an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the aforesaid suit, and a citation directed to the said G. Nelson staying and admonishing her to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California, according to law within thirty days from the date of such citation;

NOW, THEREFORE, the condition of this obligation is such that if the said defendant The Century Indemnity Company shall prosecute its said appeal to effect and satisfy the judgment against it, and answer all damages and costs if it fail to make its appeal good, then the above obligation shall be void; otherwise to remain in full force and effect.

And further, the undersigned surety agrees that in case of a breach of any condition hereof, the above-entitled court may, upon notice to the undersigned Continental Casualty Company of not less

than ten days, proceed summarily in the above entitled cause to ascertain the amount which said Continental Casualty Company is bound to pay on account of such breach, and render judgment therefor against it and award execution thereof, not exceeding, however, the sum specified in this undertaking.

THE CENTURY INDEMNITY COMPANY,
(Seal) By H. F. Mills.
CONTINENTAL CASUALTY COMPANY,
(Seal) By B. F. Cator, Attorney in fact.

The within and foregoing bond on appeal is hereby approved, both as to sufficiency and form.

Dated: August 13th, 1934.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Service of the within Bond on Appeals admitted this 13th day of August, 1934.

HADSELL, SWEET, INGALLS & LAMB,
Attorney for Plaintiff.

[Endorsed]: Filed Aug. 13, 1934. [104]

[Title of Court and Cause.]

PRAECIPE FOR RECORD ON APPEAL.

To the Clerk of the above entitled Court:

You are hereby requested to prepare a transcript of record in the above entitled action to be filed in the United States Circuit Court of Appeals, for the Ninth Circuit, pursuant to an appeal heretofore allowed in the above entitled action, and to include in said transcript of record the following:

1. Plaintiff's complaint.
2. Defendant's answer to complaint.
3. Defendant's proposed special findings and conclusions of law.
4. Minute Order of the Court ordering judgment for plaintiff, dated June 1, 1934.
5. Special findings and conclusions of law.
6. Judgment.
7. Defendant's petition for appeal to the United States Circuit Court of Appeals for the Ninth Circuit.
8. Defendant's assignment of errors.
9. Order allowing appeal and fixing amount of bond on appeal [105]
10. Bond on appeal.
11. This praecipe.
12. Citations to the plaintiff to appear on appeal.
13. Bill of Exceptions.
14. Stipulation waiving trial by jury.

Dated: San Francisco, California, August 31, 1934.

JEWEL ALEXANDER
WILLIAM C. BACON

REDMAN, ALEXANDER &
BACON
R. P. WISECARVER
Attorneys for Defendant and
Appellant

Receipt of a copy of the within praecipe for record on appeal is hereby admitted this 31st day of August, 1934.

HADSELL, SWEET, INGALLS
& LAMB
By D. Hadsell
Attorneys for Plaintiff and
Respondent

[Endorsed]: Filed Sept. 4, 1934. [106]

District Court of the United States, Northern District of California.

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, WALTER B. MALING, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 106 pages, numbered from 1 to 106, inclusive, contain a full, true and correct transcript of the records and proceedings in the case of G. NELSON, vs. THE CENTURY INDEMNITY COMPANY, No. 19086-K, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on ap-

peal is the sum of $22.95 and that the said amount has been paid to me by the Attorneys for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 20th day of September, A. D. 1934.

(Seal) WALTER B. MALING,
Clerk.
By J. P. Welsh, Deputy Clerk.

[107]

UNITED STATES OF AMERICA, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA TO G. NELSON, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein THE CENTURY INDEMNITY COMPANY is appellant, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the Northern District of California, this 13th day of August, A. D. 1934.

FRANK H. KERRIGAN,
United States District Judge.

Received copy of within Citation on Appeal this 13th day of August, 1934.

HADSELL, SWEET, INGALLS & LAMB
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 14, 1934. [108]

[Docketed]: No. 7618. United States Circuit Court of Appeals for the Ninth Circuit. The Century Indemnity Company, a corporation, Appellant, vs. G. Nelson, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed September 26, 1934.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7618

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE CENTURY INDEMNITY CO., a Corp.,
Appellant,

vs.

G. NELSON,
Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Monday, May 27, 1935.

Before: WILBUR, DENMAN and MATHEWS, Circuit Judges.

ORDER OF SUBMISSION.

Ordered appeal in above cause argued by Mr. R. P. Wisecarver, counsel for appellant, and by Mr. D. Hadsell, counsel for appellee, and submitted to the Court for consideration and decision.

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Monday, June 22, 1936.

OPINION

Before: GARRECHT and DENMAN, Circuit Judges.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the Court, Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[Title of Court and Cause.]

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

OPINION

Before: WILBUR, DENMAN and MATHEWS, Circuit Judges.

WILBUR, Circuit Judge:

This is the second appeal in this case. We refer to the opinion on the first appeal, Nelson v. Century Indemnity Co., 65 F.(2d) 765, for a statement of facts. The former appeal was taken by G. Nelson from a judgment that she take nothing. This appeal is by her opponent the Century Indemnity Company, which will hereafter be referred to as the "Indemnity Company", from a judgment in favor of G. Nelson for the full amount claimed. G. Nelson, appellee, is suing the Indemnity Company, appellant, as assignee of a judgment rendered against that company in an attachment suit, No. 204668, commenced by V. Berges in the Superior Court of California in San Francisco, against N. Abraham, H. Silverman, L. Silverman, doing business under the name of N. Abraham Mercantile Company, and the San Francisco Iron & Metal Company. (Silverman and Silberman are stipulated to be one and the same.)

On the first trial the Indemnity Company, which had executed a release of attachment bond on behalf of the San Francisco Iron & Metal Company, H. Silberman and L. Silberman, defeated recovery by G. Nelson on the judgment in action No. 204668,

supra, assigned to her upon the ground that she was trustee for the Fidelity and Casualty Company, hereinafter referred to as the "Fidelity Company", which had executed a similar bond on behalf of N. Abraham for the release of his property attached. The Fidelity Company had advanced the money to G. Nelson to purchase the judgment. Upon this basis the Indemnity Company claimed that the superior court judgment (in action No. 204668) had been paid by the Fidelity Company for N. Abraham, one of the judgment debtors. It will be observed that in the first trial the Indemnity Company relied upon the interrelationship between the parties as disclosed by the judgment roll and by the bonds given in action No. 204668. Now, the position of the parties being reversed, the Indemnity Company claims that the findings and the judgment in the superior court action No. 204668 do not correctly show that interrelationship. It now claims that N. Abraham as between the defendants was in fact the principal and only debtor, and that his surety, the Fidelity Company, having paid the debt, the Indemnity Company has no further responsibility therefor on account of the release bond given by it.

Before discussing appellant's claims of error some procedural questions should be first considered. Many of the Indemnity Company's assignments of error, and five of the seven specifications of error in its brief, are based upon the failure of the trial court to make certain special findings requested by the Indemnity Company. These as-

signments and specifications cannot be considered because the findings were proposed after the trial had been completed and after the court had announced its decision and hence did not occur during the trial. Continental Nat'l Bk. v. Nat'l City Bk. of N. Y., 69 F. (2d) 312, 317, and cases therein cited.

There remain two other specifications of error, 1 and 4, to be considered, which are as follows:

"1. The court erred in that the judgment is contrary to the law of the case established on the first appeal which provides that recovery can be had only for contribution or reimbursement and no more.

"4. The court erred in admitting in evidence the pleadings and findings of fact in the prior case of Berges v. Abraham containing a collateral finding of fact that San Francisco Iron & Metal Company had agreed with N. Abraham to pay that particular debt which formed the basis of the judgment in the case of Berges v. Abraham and holding the defendant, Century Indemnity Company, was also bound thereby."

The fourth specification of error, supra, is predicated upon assignments of error Nos. 7 and 8, which are as follows:

"7. That said court erred in admitting into the record as evidence, over the objection of this defendant, the findings of fact and particularly finding 'IV' of said findings of fact in the judgment roll in the case of Berges v. Abraham, et al.

"8. That said court erred in failing and refusing to find that finding IV in the findings of fact in the case of Berges v. Abraham, et al, was not res adjudicata as between the defendants in said action and is not res adjudicata between the parties to the present action."

The eighth assignment of error is based upon refusal of the trial court to make certain findings requested by the Indemnity Company, as we have already pointed out. This request came too late and need not be considered.

Assignment No. 7 fails to conform to our rule 11 with reference to assignments of error in the admission of evidence, because it does not "quote the full substance of the evidence admitted or rejected". United States v. Nat'l Bk. of Commerce of Seattle, 73 F.(2d) 721; Fidelity & Deposit Co. of Maryland v. Lindholm, 66 F.(2d) 56. Neither does it state the objection made by the defendant nor an exception taken, as required by the rule. Goldstein v. United States, 73 F.(2d) 804.

Specification of error No. 4 also violates our rule 24 in two particulars. It does not set forth separately and particularly each error asserted and intended to be urged. Two errors are specified; one, the admission of certain evidence, and, two, deciding that the appellant is bound thereby. The rule also provides: "When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected." The specification

does not set out the full substance of the evidence received.

Therefore, specification 4, and assignments 7 and 8, upon which it is based, violate our rules and need not be considered.

This leaves for consideration specification of error No. 1. *This specification is based upon assignments* of error numbered 1, 2, 3, 4, 5, 6, 9, 10, 11, 13, 15, 17, 19, 20, 22, 23, 25, 26, 27 and 28. Most of these assignments specify the refusal of the trial court to make certain findings of fact requested by the Indemnity Company. These assignments, as we have stated, cannot be considered because the requests therefor were made too late. This is true in the case of the following assignments: 2, 3, 4, 5, 6, 9, 10, 11, 13, 15 and 20. Of the other assignments referred to by appellant in support of this specification of error, Nos. 17, 23, 25, 26, 27 and 28 are too general to be considered. Virginia Ry. Co. v. Chambers, 46 F. (2d) 20; U. S. Shipping Board E. F. Corp. v. Drew, 288 F. 374; Columbia Pictures Corp. v. Lawton-Byrns, 73 F.(2d) 18. Assignment No. 22 is "that the judgment is contrary to law in that it is not justified by any evidence nor is it supported by findings of fact". This assignment is not only too general, but it embraces three different assignments of error contrary to our rule 11. The alleged errors embraced in this assignment are as follows: First, "that the judgment is contrary to law * * * ". This cannot be considered because too general. Washburn v. Douthit, 73 F.(2d) 23. This assignment is also too general and is not based upon any

ruling of the court pointed out in the specification. Hecht v. Alfaro, 10 F. (2d) 464. Third, "nor is it supported by findings of fact". This latter assignment, if entirely separate from the other two, would be a proper assignment to challenge the sufficiency of the findings of fact to support the judgment. Assignment 22 need not be considered because it violates the rule requiring assignments of error to "set out separately and particularly each error asserted and intended to be urged".

Assignments of error No. 1 and 19 are yet to be considered.

Assignment No. 1 assigns as error the denial of appellant's motion for nonsuit. The appellant proceeded after the ruling to offer its testimony and thus waived any error in the ruling. Bogh v. Gassert, 149 U. S. 17; Maryland Casualty Co. v. Jones, 35 F.(2d) 791; United States v. Alberby, 63 F.(2d) 965.

Assignment No. 19 is "that the judgment is contrary to law in this, that it adjudges in effect that the plaintiff can recover as and for an assignment of the judgment, whereas her sole right of recovery is for contribution or reimbursement and not as assignee of the judgment". This assignment does not point out a ruling of the trial court on any proposition of law or fact claimed to be erroneous. If the appellant desired a ruling of the trial court upon a proposition of law involved in the case not arising from the rulings upon the introduction or rejection of evidence, or the overruling of its motions or demurrers, it should have formulated its

proposition of law and have requested a ruling thereon. Hecht v. Alfaro, 10 F.(2d) 464, supra. The basic difficulty in the presentation of this appeal is the assumption by the Century Indemnity Company that it could raise its various contentions by requests for findings of fact made after the trial was concluded.

It is exceedingly unsatisfactory to dispose of this case solely because of failure of the parties to comply with the rules pertaining to the assignments of error and specifications of error. We therefore add the following observations with reference thereto: An assignment of error must be based upon an error which actually occurred in the trial of the case. If no error occurred there is no basis for the assignment. Gartner v. Hays, 272 F. 896. Here, as we have said, the failure to make findings requested after the trial was not an error during the course of the trial and is not reviewable.

Specifications of error stand upon a different footing, being required by rule of this court and by the rules of most appellate courts for convenience of the court and for greater certainty in the presentation and disposition of cases on appeal. For that reason we have been more liberal in dealing with the matter of specifications of error in the brief than in dealing with assignments of error in the record. A violation of our rule, however, justifies the court in refusing to consider the specifications which violate the rule.

On the first appeal, Nelson v. Century Indemnity Co., 65 F.(2d) 765, supra, we held that if the San

Francisco Iron & Metal Company had assumed the debt due from its co-defendants and joint judgment debtors as found by the superior court of the state in its findings of fact in action No. 204668, and if the value of the property of the San Francisco Iron & Metal Company released from attachment in that action by virtue of the bond of the Indemnity Company given therein, and herein sued upon, equalled or exceeded the amount due on the judgment secured by V. Berges in action 204668, then, in that event, G. Nelson was entitled to recover the full amount furnished to her by the Fidelity Company and in turn paid by her to Berges for the assignment of the judgment and bond of the Indemnity Company.

The trial court found on the retrial that the value of the property of the San Francisco Iron & Metal Company released from attachment by the Indemnity Company's bond was over $6,000, thus exceeding the amount of the judgment secured by V. Berges in action 204668.

It might be urged that its findings of fact with relation to whether or not the San Francisco Iron & Metal Company has assumed to pay the debt of N. Abraham, was not a finding of the ultimate fact involved because the court in its findings merely quoted the findings of the superior court of the state without in express terms adopting them as it own. (See footnote 1.) However, the appellant does not

(Footnote 1):

XII. That in said action entitled V. Berges v. San Francisco Iron and Metal Company which is

attack these findings on the ground that they are of probative rather than ultimate facts. On the contrary, in its assignment No. 21 it urges "that the said court erred in finding that the San Francisco Iron & Metal Company agreed to pay the debt which formed the subject matter of the judgment sued on, in that there is no evidence to support said finding and it is contrary to the evidence". This

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mentioned in paragraph II of these findings, the plaintiff alleged by amendment to her complaint, and the defendants H. Silberman, L. Silberman and San Francisco Iron & Metal Company, a corporation, in answer to said amendment to the complaint denied, as follows:

"That prior to the commencement of this action and for good and valuable consideration, defendant San Francisco Iron & Metal Company, a corporation, agreed to and did assume all of the obligations and liabilities of said N. Abraham Mercantile Company and of N. Abraham, H. Silberman, 1st Doe to 10th Doe individually and as copartners doing business under the name of N. Abraham Mercantile Company; that about October, 1927, defendant San Francisco Iron & Metal Company received all or practically all of the property and assets of the other defendants in this paragraph mentioned and, in consideration thereof and other valuable considerations, specially promised and agreed to apply the said property and assets to the payment of the claim and matters herein sued for, but that said defendant San Francisco Iron & Metal Company has wholly failed to do."

XIII. That thereafter the court in said action after the trial thereof made and entered its findings of fact:

"That prior to the commencement of this action and for good and valuable consideration, defendant San Francisco Iron & Metal Company, a corporation, agreed to and did assume all of the obligations and liabilities of said N. Abraham Mercantile Company and of N. Abraham, L. Silberman and San

assignment of error shows that instead of claiming that the court found the probative facts rather than the ultimate facts with relation to the agreement of

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Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as copartners doing business under the name of N. Abraham Mercantile Company; that prior to the commencement of this action, defendant San Francisco Iron & Metal Company, a corporation, received all or practically all of the property and assets of the N. Abraham Mercantile Company and of N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as copartners doing business under the name of N. Abraham Mercantile Company, and in consideration thereof and other valuable considerations specially promised and agreed to apply said property and assets to the payment of the said indebtedness to the said Goodyear Redwood Lumber Company, but that said defendant San Francisco Iron & Metal Company has wholly failed to do so."

XIV. That the terms of said judgment so rendered in said action are as follows:

"This cause coming on regularly to be heard and after the evidence was introduced and argument had by counsel for the respective parties, the court made and filed its findings of fact and conclusions of law. Pursuant thereto, It is hereby ordered, adjudged and decreed:

"(1) That plaintiff, V. Berges, do have and recover from the defendants, N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as copartners doing business under the name of N. Abraham Mercantile Company, the sum of five thousand six hundred forty-three and 65/100 ($5,643.65) dollars, together with her costs of action taxed at $69.90.

"(2) That the defendants take nothing by reason of their counter claim and cross-complaint.

"Dated: October 10, 1929."

the San Francisco Iron & Metal Company, the appellant is relying upon the alleged failure of the evidence to support the finding of this ultimate fact. In view of the findings, first, that the value of the property released by the Indemnity Company's bond amounted to $6,000, second, that the San Francisco Iron & Metal Company had assumed and agreed to pay the debt of N. Abraham, it follows from our decision on the former appeal that the judgment of the trial court is correct.

During the trial of this action the parties submitted the case upon all the testimony introduced at the former trial and upon other evidence then adduced. The Indemnity Company objected to the introduction of the judgment roll in action No. 204668. The objection was not well taken. Introduction of the judgment roll was the proper way to prove the judgment. Fennell v. United States, 67 F.(2d) 768; McLinley Bros. v. McCauley, 9 P. (2d) 298; Terry v. Gibson, 128 P. 1126. What the appellant seeks to raise is the question of the probative effect of the findings and judgment therein (No. 204668) upon the defendants therein and upon their sureties in privity with them in this action between such sureties. That question is a debatable one but is involved herein only as it affects the sufficiency of the evidence as a whole to support the judgment. Although the appellant moved for judgment, presumably upon the ground that the evidence would not support a judgment in favor of the plaintiff and appellee, it did not except to the ruling of the court denying the motion nor did it as-

sign such ruling as error. Assignments 25, 26, 27 and 28, (cited in footnote 2) do not refer to that ruling and are too general. The assignment should be, "The court erred in denying the defendant's motion for judgment". Furthermore, the appellant introduced a witness, L. Silberman, who was one of the copartners and codefendants in action No. 204668. He testified that the partnership which had purchased the steel rails from N. Abraham subsequently dissolved and that the San Francisco Iron & Metal Company assumed all indebtedness of the copartnership.

This evidence alone was sufficient to support the implied conclusion of the trial court that the San Francisco Iron & Metal Company had assumed the obligations of the copartners. It is clear that the judgment and findings in action No. 204668 are conclusive that "the indebtedness sued upon was that of the partnership. It is therefore of no importance whether the findings in the superior court No. 204668 relative to the assumption of the entire debt by the San Francisco Iron & Metal Company is conclusive upon the parties to the action. We may

(Footnote 2):

25. That the said court erred in ordering, rendering and in entering final judgment herein on June 16, 1934.

26. That the said court erred generally in refusing to order judgment in favor of this defendant and against plaintiff.

27. That the said court erred in ordering judgment for plaintiff for any sum at all.

28. That the said court erred in refusing to order judgment for the defendant upon the evidence in the cause.

assume as appellant contends that without additional evidence it is not. There is, therefore, no reason for relaxing our rule with reference to the specifications of error and there is no basis for relaxing the rule with reference to assignments of error as should be done only in case of a plain error unassigned (rule 11) and so clearly prejudicial as to result in injustice. In re Morgan, (C. C. A. 6) 26 F.(2d) 183; Mutual Life Ins. Co. v. Parkinson, (C. C. A. 6) 72 F.(2d) 759.

Judgment affirmed.

[Endorsed]: Opinion. Filed June 20, 1936. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 7618.

THE CENTURY INDEMNITY CO., a Corp.,

Appellant.

vs.

G. NELSON,

Appellee.

JUDGMENT.

Upon appeal from the District Court of the United States for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Div., and was duly submitted:

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the appellee and against the appellant.

It is further ordered and adjudged by this Court that the appellee recover against the appellant for his costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered Jun. 22, 1936. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from proceedings of Monday, August 17, 1936.

Before: WILBUR, GARRECHT and DENMAN, Circuit Judges.

ORDER GRANTING PETITION FOR REHEARING.

Upon consideration thereof and by direction of the court, it is ordered that the petition of appellant, filed July 20, 1936, and within time allowed therefor by rule of Court, for a rehearing of above cause be, and hereby is granted.

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from proceedings of Tuesday, November 24, 1936.

Before: WILBUR, DENMAN and MATHEWS, Circuit Judges.

ORDER OF SUBMISSION ON HEARING.

Ordered reargument in above cause presented by Mr. R. P. Wisecarver, counsel for appellant, and by Mr. Dan Hadsell, counsel for appellee, and submitted to the Court for consideration and decision.

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from proceedings of Monday, June 7, 1937.

Before: WILBUR, DENMAN and MATHEWS, Circuit Judges.

ORDER DIRECTING FILING OF OPINION AND DISSENTING OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the Court, ordered that the typewritten opinion and dissenting opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a judgment be filed in said cause and recorded in the minutes of this court in accordance with the majority opinion rendered.

[Title of Court and Cause.]

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

OPINION AS AMENDED.

Before: WILBUR, DENMAN and MATHEWS, Circuit Judges. WILBUR, Circuit Judge:

This is the second appeal in this case. We refer to the opinion on the first appeal, Nelson v. Century Indemnity Co., 65 F.(2d) 765, for a statement of facts. The former appeal was taken by G. Nelson from a judgment that she take nothing. This appeal is by her opponent the Century Indemnity Company, which will hereafter be referred to as the "Indemnity Company", from a judgment in favor of G. Nelson for the full amount claimed.

On the first appeal, Nelson v. Century Indemnity Co., 65 F.(2d) 765 supra, we held that if the San Francisco Iron & Metal Company had assumed the debt due from its co-defendants and joint judgment debtors as found by the superior court of the state in its findings of fact in action No. 204668, and if the value of the property of the San Francisco Iron & Metal Company released from attachment in that action by virtue of the bond of the Indemnity Company given therein, and herein sued upon, equalled or exceeded the amount due on the judgment secured by V. Berges in action No. 204668, then, in that event, G. Nelson was entitled to recover the

full amount furnished to her by the Fidelity Company and in turn paid by her to Berges for the assignment of the judgment and bond of the Indemnity Company.

The trial court found on the retrial that the value of the property of the San Francisco Iron & Metal Company released from attachment by the Indemnity Company's bond was over $6,000, thus exceeding the amount of the judgment secured by V. Berges in action No. 204668.

G. Nelson, appellee, is suing the Indemnity Company; appellant, as assignee of a judgment rendered against that company in an attachment suit, No. 204668, commenced by V. Berges in the Superior Court of California in San Francisco, against N. Abraham, H. Silverman, L. Silverman, doing business under the name of N. Abraham Mercantile Company, and the San Francisco Iron & Metal Company. (Silverman and Silberman are stipulated to be one and the same.)

On the first trial the Indemnity Company, which had executed a release of attachment bond on behalf of the San Francisco Iron & Metal Company, H. Silberman and L. Silberman, defeated recovery by G. Nelson on the judgment in action No. 204668, supra, assigned to her upon the ground that she was trustee for the Fidelity and Casualty Company, hereinafter referred to as the "Fidelity Company", which had executed a similar bond on behalf of N. Abraham for the release of his property attached.

The Fidelity Company had advanced the money to G. Nelson to purchase the judgment. Upon this basis the Indemnity Company claimed that the superior court judgment (in action No. 204668) had been paid by the Fidelity Company for N. Abraham, one of the judgment debtors. It will be observed that in the first trial the Indemnity Company relied upon the interrelationship between the parties as disclosed by the judgment roll and by the bonds given in action No. 204668. Now, the position of the parties being reversed, the Indemnity Company claims that the findings and the judgment in the superior court action No. 204668 do not correctly show that interrelationship. It now claims that N. Abraham as between the defendants was in fact the principal and only debtor, and that his surety, the Fidelity Company, having paid the debt, the Indemnity Company has no further responsibility therefor on account of the release bond given by it.

Before discussing appellant's claims of error some procedural questions should be first considered. Many of the Indemnity Company's assignments of error, and five of the seven specifications of error in its brief, are based upon the failure of the trial court to make certain special findings requested by the Indemnity Company. These assignments and specifications cannot be considered because the findings were proposed after the trial had been completed and after the court had announced its decision and hence did not occur during the trial. Continental Nat'l. Bk. v. Nat'l. City Bk. of N. Y.,

69 F.(2d) 312, 317, and cases therein cited. (Note 1.)

There remain two other specifications of error, 1 and 4, to be considered, which are as follows:

"1. The court erred in that the judgment is contrary to the law of the case established on the first appeal which provides that recovery can be had only for contribution or reimbursement and no more.

"4. The court erred in admitting in evidence the

(Note 1):

In the petition for rehearing the appellant, for the first time, contends that his request for special findings was timely although made after the court had decided the case and granted judgment to plaintiff. This contention is made upon the ground that under Rule 42 of the District Court from the Northern District of California the trial is still in progress until findings are rendered by the trial court. This rule (Rule 42 U. S. Dist. Court for the Northern District of California) is quoted at length in our decision written by Judge Denman, Lando v. Equitable Life Ins. Co. of U. S., 84 F.(2d) 640, and need not be repeated here in full. The rule provides that rendition of the decision or opinion shall be considered "as merely a preliminary order for judgment". This rule is evidently adopted to prevent the possibility that the "decision" or "opinion" should be deemed or taken as "findings of fact" on the one hand or as a "judgment" on the other hand, and thus to give to the successful party an opportunity thereafter to prepare special findings. The rule of the District Court is evidently not intended to extend the time of the trial so that requests for findings thereafter made should be considered as made during the trial. If the rule were construed as the appellant insists it should be, it would be beyond the power of the District Court for the trial is concluded when the decision is made.

pleadings and findings of fact in the prior case of Berges v. Abraham containing a collateral finding of fact that San Francisco Iron & Metal Company had agreed with N. Abraham to pay that particular debt which formed the basis of the judgment in the case of Berges v. Abraham and holding the defendant, Century Indemnity Company, was also bound thereby."

The fourth specification of error, supra, is predicated upon assignments of error Nos. 7 and 8, which are as follows:

"7. That said court erred in admitting into the record as evidence, over the objection of this defendant, the findings of fact and particularly finding 'IV' of said findings of fact in the judgment roll in the case of Berges v. Abraham, et al.

"8. That said court erred in failing and refusing to find that finding IV in the findings of fact in the case of Berges v. Abraham, et al., was not res adjudicata as between the defendants in said action and is not res adjudicata between the parties to the present action."

The eighth assignment of error is based upon refusal of the trial court to make certain findings requested by the Indemnity Company, as we have already pointed out, this request came too late and need not be considered.

Assignment No. 7 fails to conform to our Rule 11 with reference to assignments of error in the admission of evidence, because it does not "quote the full substance of the evidence admitted or rejected".

United States v. Nat'l Bk. of Commerce of Seattle, 73 F.(2d) 721; Fidelity & Deposit Co. of Maryland v. Lindholm, 66 F.(2d) 56. Neither does it state the objection made by the defendant nor an exception taken, as required by the rule. Goldstein v. United States, 73 F.(2d) 80.

Specification of error No. 4 also violates our rule 24 in two particulars. It does not set forth separately and particularly each error asserted and intended to be urged. Two errors are specified; one, the admission of certain evidence, and, two, deciding that the appellant is bound thereby. The rule also provides: "When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected." The specification does not set out the full substance of the evidence received.

Therefore, specification 4 and assignments 7 and 8, upon which it is based, violate our rules and need not be considered.

This leaves for consideration specification of error No. 1. This specification is based upon assignments of error numbered 1, 2, 3, 4, 5, 6, 9, 10, 11, 13, 15, 17, 19, 20, 22, 23, 25, 26, 27 and 28. Most of these assignments specify the refusal of the trial court to make certain findings of fact requested by the Indemnity Company. These assignments, as we have stated, cannot be considered because the requests therefor were made too late. This is true in the case of the following assignments: 2, 3, 4, 5, 6, 9,

10, 11, 13, 15, and 20. Of the other assignments referred to by appellant in support of this specification of error, Nos. 17, 23, 25, 26, 27 and 28 are too general to be considered. Virginia Ry. Co. v. Chambers, 36 F.(2d) 20; U. S. Shipping Board E. F. Corp. v. Drew, 288 F. 374; Columbia Pictures Corp. v. Lawton-Byrns 73 F.(2d) 18. Assignment No. 22 is "that the judgment is contrary to law in that it is not justified by any evidence nor is it supported by findings of fact". This assignment is not only too general, but it embraces three different assignments of error contrary to our rule 11. The alleged errors embraced in this assignment are as follows: First, "that the judgment is contrary to law * * *". This cannot be considered because too general. Washburn v. Couthit, 73 F. (2d) 23. Second, "* * * it is not justified by any evidence". This assignment is also too general and is not based upon any ruling of the court pointed out in the specification. Hecht v. Alfaro, 10 F.(2d) 464. Third, nor is it supported by findings of fact". This latter assignment, if entirely separate from the other two, would be a proper assignment to challenge the sufficiency of the findings of fact to support the judgment. Assignment 22 need not be considered because it violates the rule requiring assignments of error to "set out separately and particularly each error asserted and intended to be urged."

Assignments of error Nos. 1 and 19 are yet to be considered.

Assignment No. 1 assigns as error the denial of appellant's motion for nonsuit. The appellant proceeded after the ruling to offer its testimony and thus waived any error in the ruling. Bogh v. Gassert, 149 U. S. 17; Maryland Casualty Co. v. Jones, 35 F.(2d) 791; United States v. Alberby, 63 F.(2d) 965.

Assignment No. 19 is "that the judgment is contrary to law in this, that it adjudges in effect that the plaintiff can recover as and for an assignment of the judgment, whereas her sole right of recovery is for contribution or reimbursement and not as assignee of the judgment". This assignment does not point out a ruling of the trial court on any proposition of law or fact claimed to be erroneous. If the appellant desired a ruling of the trial court upon a proposition of law involved in the case not arising from the rulings upon the introduction or rejection of evidence, or the overruling of its motions or demurrers, it should have formulated its proposition of law and have requested a ruling thereon. Hecht v. Alfaro, 10 F.(2d) 464, supra. The basic difficulty in the presentation of this appeal is the assumption by the Century Indemnity Company that it could raise its various contentions by requests for findings of fact made after the trial was concluded. Although the appellant moved for judgment, presumably upon the ground that the evidence would not support a judgment in favor of the plaintiff and appellee, it did not except to the ruling of the court denying the motion nor did it assign such ruling as error. Assignments 25, 26,

27 and 28 (cited in footnote 1) do not refer to that ruling and are too general. The assignment should be, "The court erred in denying the defendant's motion for judgment." An assignment of error must be based upon an error which actually occurred in the trial of the case. If no error occurred there is no basis for the assignment. Gartner v. Hays, 272 F. 896. Here, as we have said, the failure to make findings requested after the trial was not an error during the course of the trial and is not reviewable.

Specifications of error stand upon a different footing, being required by rule of this court and by the rules of most appellate courts for the convenience of the court and for greater certainty in the presentation and disposition of cases on appeal. For that reason we have been more liberal in dealing with the matter of specifications of error in the brief than in dealing with assignments of error in the record. A violation of our rule, however, justifies the court in refusing to consider the specifications which violate the rule.

The judgment is affirmed.

(Footnote 1):

25. That the said court erred in ordering, rendering and in entering final judgment herein on June 16, 1934.

26. That the said court erred generally in refusing to order judgment in favor of this defendant and against plaintiff.

27. That the said court erred in ordering judgment for plaintiff for any sum at all.

28. That the said court erred in refusing to order judgment for the defendant upon the evidence in the cause.

DENMAN, Circuit Judge, Dissenting:

I am unable to concur in the denial of the consideration of the merits of the contention of this petition for rehearing, namely, that the court erroneously held the findings support the judgment.

In the opinion so holding we proceeded ex industria to discover that the following assignment of error

> "that the judgment is contrary to law in that it is not justified by any evidence nor is it supported by findings of fact"

violated a procedural rule because it contains the assignment of more than one error and fails to "set out separately and particularly each error assigned and intended to be urged".

I say ex industria, because the first brief of the appellant on the appeal set forth this contention, as follows:

> "The findings, conclusions of law, and judgment of the court are, therefore, not sustained by any findings and are not in accord with the law of the case as established by this court in its prior decision."

And also:

> "Therefore, the judgment of the court in the present instance is not only not sustained by any findings but * * *."

The brief of the appellee meets the contention under this statement of the error with many pages of argument. What is important is, that appellee never then questioned that the court is sufficiently

advised of the claimed merits of the appeal by the assignment of error which says that judgment is not sustained *either** by the evidence or by the findings. He did not only not raise any question as to the imperfection of the assignment, but he assumes, and, in effect, by his silence, admits it is good.

Having ex industria found that the assignment of two errors does not comply with the rule for their separation, our first opinion on this appeal then proceeds to state:

> "It is exceedingly unsatisfactory to dispose of this case solely because of failure of the parties to comply with the rules pertaining to the assignments of error and specifications of error."

And it then goes on to hold that the findings do sustain the judgment in the following holding:

> "In view of the findings, first, that the value of the property released by the Indemnity Company's bond amounted to $6,000, second, that the San Francisco Iron & Metal Company had assumed and agreed to pay the debt of N. Abraham, it follows from our decision on the former appeal that the judgment of the trial court is correct."

It is obvious from this holding that the court was in no way embarrassed in discovering what

*Italics are the Court's.

the two parties agreed as to one of the questions of merit in the appeal.

The petition of the appellant seeks rehearing on the ground that the court erred in the above holding that the findings support the judgment. What is more important, is that the appellee, *in his reply to the petition for rehearing,** assumes the merits of the contention is under consideration by the court in a chapter headed.

> "Did the court err in concluding that the findings support the judgment?"

I believe that the reasons presented in the petition warrant the granting of the rehearing. That, *however, is not the question to which this dissent is addressed.*

It is with reference to the attitude and emphasis of a court of justice, which has jurisdiction of an appeal, in the examination of procedural steps to inform itself as to the merits of the appeal, where both parties argue the merits as if the necessary procedural steps had been taken, and raise no question of deficiency or absence of assignment.

In this case there is no failure to assign as error that the findings did not support the judgment. The assignment is there; it was clear—so clear that it caused our ruling on it. What is done by this second opinion and decision, to which this is a dissent, is to refuse to consider the merits of the petition for rehearing by striking out from the original opinion the holding to which the petition

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*Italics are the Court's.

is addressed, thereby basing the opinion solely on this issue of the violation of our rule requiring separate statements of assigned error.

Even if the error had not been assigned at all, we have exercised our discretion to consider it and, in my opinion, would have abused that discretion if we had not. *After having exercised it,** it seems a denial of justice to frustrate the consideration of the correctness of our ruling by the mere process of blotting it out of the opinion to which the petition is addressed.

The suggestion that a *claim* of plain error is not sufficient, but that there must actually have been error to cause our examination of the record, involves a casuistry which defeats itself.

The Supreme Court makes no such mistake. The decision of Mutual Life Ins. Co. v. Parkinson, (CCA-6) 72 Fed.(2d) 759, cited in our original opinion on this appeal, in turn relies upon the Supreme Court decision of Columbia Heights Co. v. Rudolph, 217 U. S. 547. In that case the Supreme Court construed its then rules 21 and 35 which reserved the right to consider plain error unassigned. The court held that it is the *claim* of error made by the plaintiff in error and not the actual existence of error which permits the invocation of the rule that the claim may be considered. This is apparent because the court did examine the record under the claim of unassigned error and did find that it was not error. Its language is:

*Italics are the Court's.

> "* * * For these reasons we shall exercise the option reserved under both rules 21 and 35 of examining the transcript that we may be advised as to whether there has occurred any 'plain error' which obviously demands correction.
>
> 1. Did the court err in allowing an assessment of benefits under the act of June 6, 1900? We think not." (Here follows two pages of discussion why the record shows they did not so "think".)
>
> Columbia Heights Co v. Rudolph, supra, 552.

See also Wiborg v. U. S., 163 U. S. 632, 658.

The presence of the two errors in the assignment which fails to comply with our rule, in no way concerns the jurisdiction of the court. Since the jurisdiction is here and the parties are here, each urging his contention on the merits of the claim of appellant, and appellee does not complain of the assignment; and since the assignment fully informs us of what the contention is, our industrious discovery of a technical procedural reason for refusing to consider its merits cannot be said to be the search for justice for which the Federal courts were created.

Concerning Rule 42 of the United States District Court for the Northern District of California, it is my opinion that this rule was intended to create a situation equivalent to a treatment of the decision as merely tentative and thereby extending the trial, and not to create a final disposition of the cause. I agree that if this rule could be interpreted to convert an announced decision into a statement

of the judge that "I am now inclined to decide this case for such a party and desire proposed findings for my further enlightenment", the claimed error, in the denial of the proposed findings in this case could be considered as a more tenable contention, but I cannot so construe the phraseology of the rule.

I do not care to indicate what would be the effect of a standard form of such a tentative decision, required by a rule to be used by all the judges of the District Court and actually used in announcing such tentative decision, on the question whether findings thereafter requested, are requested "during the trial".

[Endorsed]: Opinion and Dissenting Opinion. Filed Jun. 7, 1937. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 7618

THE CENTURY INDEMNITY COMPANY, a Corporation,

Appellant,

vs.

G. NELSON,

Appellee.

JUDGMENT

Upon appeal from the District Court of the United States for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and was duly submitted:

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the appellee and against the appellant.

It is further ordered and adjudged by this Court that the appellee recover against the appellant for his costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered Jun 7, 1937. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Monday, July 19, 1937.

Before: DENMAN, STEPHENS and HEALY, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING

Upon consideration of the petition of appellant, filed July 2, 1937, for a rehearing of above cause, and of appellee's reply thereto, filed July 12, 1937, and by direction of the Court, it is ordered—Denman, Circuit Judge, dissenting,—that the said petition for rehearing be, and hereby is denied.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Messrs. Redman, Alexander and Bacon, counsel for the appellant, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including September 1, 1937; and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

WILLIAM DENMAN,
United States Circuit Judge.

Dated: San Francisco, California, July 22, 1937.

[Endorsed]: Filed Jul. 22, 1937. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and eighty-three (183) pages, numbered from and including 1 to and including 183, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 14th day of August, A. D. 1937.

[Seal] PAUL P. O'BRIEN,
Clerk.

[fol. 185] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 18, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.